Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DOUG RANKIN and VICTORIA RANKIN,

Petitioners,

v.

MARK EVANS, RICHARD WILLIE, SHERIFF OF PALM BEACH COUNTY, PALM BEACH COUNTY SHERIFF'S DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rule 50(a)(2) of the Federal Rules of Civil Procedure requires a party seeking judgment as a matter of law to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." This specificity requirement is necessary "so that the responding party may seek to correct any overlooked deficiencies in the proof." Advisory Committee Notes to 1991 Amendments to Fed.R.Civ.P. 50. If a party moves for judgment as a matter of law at the close of all the evidence, and the trial court denies the motion, the moving party may renew its motion for judgment as a matter of law after trial. Fed.R.Civ.P. 50(b). In light of these provisions, two issues arise:

I. Whether a moving party satisfied the specificity requirement of Fed.R.Civ.P. 50(a)(2) when the party: (a) failed to identify any grounds for either of its motions for judgment as a matter of law; (b) relied on an earlier-prepared trial memorandum that did not purport to be a motion for judgment as a matter of law and was never advocated as or incorporated into one; and (c) omitted any reference to the basis the trial court ultimately used to grant renewed judgment as a matter of law on a section 1983 claim until two months after a jury verdict was rendered against the moving party.

II. Whether Petitioners Doug and Victoria Rankin's Seventh Amendment right to a civil jury trial free from being "otherwise re-examined in any Court of the United States" was violated where the jury verdict in their favor was vacated five months later on grounds that were not

QUESTIONS PRESENTED – Continued

raised at trial in accordance with the Federal Rules of Civil Procedure or caselaw interpreting their application.

LIST OF PARTIES

The parties to the proceeding sought to be reviewed are Doug and Victoria Rankin; Mark Evans; Palm Beach County, Florida Sheriff's Department; and Richard Willie, Sheriff of Palm Beach County.

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OPINIONS BELOW

The January 29, 1998 opinion of the Eleventh Circuit Court of Appeals, which is herein sought to be reviewed, is reported at 133 F.3d 1425 (11th Cir.1998). It is reprinted in the appendix to this petition at App. A. The prior order of the United States District Court for the Southern District of Florida, entered May 15, 1995, case number 91-8012-CIV-GONZALEZ, is unpublished. It is attached to this petition at App. B.

STATEMENT OF JURISDICTION

The decision of the Eleventh Circuit Court of Appeals was issued on January 29, 1998. App. A. Timely application for rehearing was submitted, and the Court of Appeals denied rehearing on April 2, 1998. App. C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Relevant Facts and Procedural History

Throughout most of the 1980s, Doug and Victoria Rankin owned and operated without incident the Sugar Plum School House in Lake Worth, Florida. On November 7, 1988, child psychologist Martha Brake enrolled her three-year-old daughter, Amber, at the school. Brake quickly became dissatisfied, yelled at other parents, and after two weeks removed Amber from Sugar Plum.

On November 21, 1988, after cleaning out Amber's school locker and taking her child home, Brake made an audio recording of her daughter stating that "Baba Loo" made a "hole" in her "bottom." Brake took Amber to pediatrician Dr. Donald Drummond the same day, where an examination showed "long term" injury of a small healed notch in her hymen that was at least two to three weeks old and perhaps older. This healed notch was the only purported evidence of penetration. Significantly, as Amber was at Sugar Plum for only two weeks, the healed notch indicates the injury *pre-dated* Amber's presence at the school and contact with Mr. Rankin. The examination also showed fresh irritation consistent with tight underwear or vigorous wiping.

The next morning, November 22, 1988, Brake took Amber to Palm Beach County Sheriff's Department Deputy Mark Evans. During the child's videotape interview, she was asked what happened at school. Amber replied, "I don't know." After repeated prompting and being asked "What's his name?," Amber mentioned "Pluto," then "Donald Duck," then finally "Baba Loo." At no point in the interview did anyone ask Amber who "Baba Loo" was or who she used that term to refer to. The mother, but never the child, identified "Baba Loo" as Mr. Rankin.

Deputy Evans then called Dr. Drummond, who told Deputy Evans of the "long term" injury. Deputy Evans denied this at trial, but was impeached by his own handwritten notes stating the evidence of penetration was "long term."

With less than an hour's investigation and in the face of conflicting evidence, Deputy Evans sought the arrest of

Doug Rankin for sexual battery on a child under 12 years of age, a capital felony in Florida. The case was submitted to a grand jury that did not indict Mr. Rankin, choosing instead to declare him "completely innocent." All charges were dropped, but Doug and Victoria Rankin, ostracized by this highly publicized case, had to sell the school and leave the community.

On January 10, 1991, Petitioners Doug and Victoria Rankin filed a two-count complaint in U.S. District Court for the Southern District of Florida against Deputy Mark Evans, the sheriff of Palm Beach County, and the Palm Beach County Sheriff's Department. Count one was a section 1983 claim (42 U.S.C. § 1983), and count two was a state claim for false arrest. The basis for jurisdiction was 28 U.S.C. §§ 1331, 1332, and 1343(3).

The case went to jury trial in December 1994 before the Honorable Judge Jose Gonzalez, Jr. On December 20, 1994, at the close of Petitioners/Plaintiffs' case, the Respondents/Defendants moved for judgment as a matter of law (formerly known as directed verdict). The motion was one sentence: "The Defendants, Mark Evans and Richard P. Wille will move for a directed verdict." Respondents/Defendants gave no grounds for their motion. The court denied the motion, saying it had considered the evidence and testimony as well as Respondents/Defendants' trial memorandum and the cases cited in it. The trial memorandum, prepared *before* trial, did not discuss or integrate the evidence adduced at trial; was not relied upon by Respondents/Defendants during the motion; and was not advocated or represented as supplemental to or explaining the one-sentence motion for judgment as a matter of law.

After their motion was denied, Respondents/Defendants put on their case. At the close of all the evidence, Respondents/Defendants again moved for judgment as a matter of law. The motion was again made up of one sentence: "Defendant Mark Evans and Richard B. Wille would renew its [sic] motion for a directed verdict." As before, Respondents/Defendants gave no grounds for the motion, and also did not refer to the pre-made trial memorandum. The court denied the motion "on the basis previously announced at the close of the Plaintiffs' case in chief." On December 21, 1994 the jury found for Petitioners/Plaintiffs on both counts.

Final judgment was entered for the Rankins on December 23, 1994. Post-trial motions included Respondents/Defendants' January 4, 1995 motion for judgment notwithstanding the verdict (now known as motion for renewed judgment as a matter of law). *The motion absolutely failed to allege existence of probable cause as grounds to grant the motion on the section 1983 claim.* Instead, the JNOV motion alleged Deputy Evans' conduct did not demonstrate deliberate or callous indifference, and argued against Ms. Rankin's loss of consortium claim. It was not until February 27, 1995 – more than two months after the verdict and nearly two months after the time to file post-trial motions expired[1] – that Respondents/

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[1] The trial court deemed the February 27, 1995 correspondence as "memoranda" rather than part of a post-trial motion. This was designed to allow Respondents/Defendants to add the belated probable cause defense beyond the ten-day period to file post-trial motions. However, the rules provide that the period for filing and serving a renewed motion for judgment as a matter of law may not be enlarged by the court, even for

Defendants raised the probable cause issue on the section 1983 claim.

This fact is significant because the *sole* basis for the trial court's order granting renewed judgment as a matter of law was on the probable cause issue – an argument not made at the first motion for judgment as a matter of law; not made at the second motion for judgment as a matter of law; and not made in Respondents/Defendants' motion for JNOV on the section 1983 claim. Focusing primarily on the probable cause issue, the Eleventh Circuit Court of Appeals affirmed the trial court's order of judgment as a matter of law. For the reasons expressed below, Petitioners/Plaintiffs seek certiorari review.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because there is substantial confusion and conflicting decisions among the federal circuit courts about the specificity required to satisfy Fed.R.Civ.P. 50. Further, the Eleventh Circuit Court of Appeals sanctioned a radical departure of the accepted and usual course of judicial proceedings so as to call on the Supreme Court's supervisory power and plenary review over application of the Federal Rules of Civil Procedure. Finally, certiorari should be granted because the proceedings below violated Petitioners/Plaintiffs' rights under the Seventh Amendment.

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cause. Fed.R.Civ.P. 6(b); *U.S. Leather, Inc. v. H&W Partnership*, 60 F.3d 222, 225 (5th Cir.1995); *Meriwether v. Coughlin*, 879 F.2d 1037, 1041 (2d Cir.1989).

Issue I. Whether a moving party satisfied the specificity requirement of Fed.R.Civ.P. 50(a)(2) when the party: (a) failed to identify any grounds for either of its motions for judgment as a matter of law; (b) relied on an earlier-prepared trial memorandum that did not purport to be a motion for judgment as a matter of law and was never advocated as or incorporated into one; and (c) omitted any reference to the basis the trial court ultimately used to grant renewed judgment as a matter of law on a section 1983 claim until two months after a jury verdict was rendered against the moving party.

The last time this Court thoroughly discussed the requirements of Rule 50 was more than thirty years ago. *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967).[2] Since that time, the circuit courts of appeals have reached divergent conclusions about how specific a party moving for judgment as a matter of law must be to satisfy Fed.R.Civ.P. 50(a)(2). The rule is as follows:

> Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings
>
> (a) Judgment as a Matter of Law
>
> . . .
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion *shall specify* the judgment sought and the *law* and the *facts*

---

[2] The Court also discussed Rule 50 as it relates to Rule 56 (summary judgment) in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

> on which the moving party is entitled to the judgment.
>
> (emphasis added)

The importance of this provision was made clear in *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir.1991), which like the case at bar involved section 1983 and pendant state claims against police officers. The *Lewis* court, including the Hon. Stephen BREYER (then Chief Judge of the First Circuit Court of Appeal), approved the trial court's refusal to grant a directed verdict on qualified immunity, noting that the defense failed to specify grounds at its motion for directed verdict as required by Rule 50(a). *Lewis*, 944 F.2d at 953 ("At the close of the evidence counsel for the officers still had no written motion. He merely said, "I simply want to renew my oral motion earlier for directed verdict on all counts . . . "; "[T]he rule requires in the motion a specification of the grounds. Fed.R.Civ.P. 50(a) . . . Unhappily, since the motion for judgment n.o.v. cannot exceed the original motion, the point was lost."). Here, Respondents/Defendants similarly made one-sentence oral motions, and never even relied upon the earlier-submitted trial memorandum in their oral motions for judgment as a matter of law.

The First Circuit Court of Appeals plainly notes that, "The law is crystal clear that a 'party may not base its motion for a judgment n.o.v. on a ground that was not argued in its motion for directed verdict.' " *Perdoni Brothers, Inc. v. Concrete Systems, Inc.*, 35 F.3d 1, 3 (1st Cir. 1994). *Perdoni* points out that without the specificity requirement, a party can take its argument to the jury – keeping silent during its motions for directed verdict – and hope to prevail with the finders of fact. When that

plan backfires, the party can then complain on appeal that the trial court erred in denying its motion for directed verdict despite failing to elucidate the grounds for the judge. *Perdoni*, 35 F.3d at 4 ("As was its right, CSI [Rule 50 movant] simply attempted to persuade the jury that the parties intended a severable contract. Having once embarked on this course, however, CSI was not entitled to set out on a new one after its chosen litigation tactic failed.").

In a Second Circuit Court of Appeals case, *Piesco v. Koch*, 12 F.3d 332 (2d Cir.1993), the motion for directed verdict was comprised of, "Yes your honor. Defendants move for a directed verdict." That bare proffer was found insufficient to meet Rule 50's requisite that the motion specify the judgment sought and the law and facts on which the moving party is entitled to the judgment. *Piesco*, 12 F.3d at 341 ("This statement plainly did not identify the issue on which defendants contended there was insufficient evidence to permit the jury to find in favor of Piesco").

The Third Circuit Court of Appeals has also safeguarded the provisions of Rule 50. In *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614 (3d Cir.1989), the Rule 50 movant failed to specify during its directed verdict motions the ground for which the trial court, in a post-trial ruling, ultimately ordered judgment as a matter of law. The trial court relied on a ground that was an argument the Rule 50 movant made in limine *before* motions for judgment as a matter of law were made. This is similar to Judge Gonzalez' reliance in the case at bar on Respondents/Defendants' trial memorandum, which was also prepared and submitted before moving for judgment

as a matter of law. The *Kutner* court reversed the post-trial ruling that was based on a pre-directed verdict argument, noting:

> The rule that a post-trial Rule 50 motion can only be made on grounds specifically advanced in a motion for a directed verdict at the end of plaintiff's case is the settled law of this circuit . . . The sufficiency of proof of damages was not advanced for AMC's [Rule 50 movant's] directed verdict motion, and could not be relied upon, post-trial, as a ground for granting Rule 50 relief.

Kutner, 868 F.2d at 617.

Even a movant's due process arguments will fail if not raised with specificity in a motion for judgment as a matter of law. In *Livingston Chemicals, Inc. v. Permviro Systems, Inc.*, 981 F.2d 1251 (4th Cir.1992), the court affirmed the trial court's denial of an appellant/defendant's JNOV motion contending that a state's punitive damages statute deprived the party of due process under the Fourteenth Amendment. In rejecting the appellant/defendant's position, the court noted:

> Permviro's [appellant/defendant] failure to raise the issue in its motion for directed verdict during the trial precludes its reliance on the issue in its motion for judgment n.o.v. To raise an issue on judgment n.o.v., a party must preserve that right by first making an appropriate motion for directed verdict . . . 'The requirement of a proper directed verdict motion as foundation for a motion for judgment n.o.v. under Fed.R. Civ.P. (50) is not a mere technicality; it serves vitally important interests in the fair conduct of litigation.'

Livingston Chemicals, 981 F.2d at 1253 (quoting *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir.1979)).

The Sixth Circuit Court of Appeals has similarly reiterated the importance of Rule 50's specificity requirement. In *Francis v. Clark Equipment Co.*, 993 F.2d 545 (6th Cir.1993), the court concluded the defendant's motion as a matter of law failed where it "did not specify what law it was relying on for its argument." Reversing the products liability case, the court noted "a more detailed statement is required by Rule 50(a)(2), and in the present case there was not sufficient foundation for the motion." *Francis*, 993 F.2d at 554; *see also Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 n.7 (8th Cir.1995) (noting the purposes behind Rule 50).

Recently the Ninth Circuit Court of Appeal, in reversing the trial court, criticized a judgment as a matter of law where the sole substance of the motion was, "Your Honor, I make a motion under Federal Rule of Civil Procedure 50 on grounds that [plaintiff] has not sustained his burden of proof and defendant should be entitled to judgment as a matter of law." *Waters v. Young*, 100 F.3d 1437, 1440 (9th Cir.1996). Like Respondents/Defendants' one-sentence motions for directed verdict, the *Waters* defendant failed to comply with the specificity requirement of Rule 50 and its purpose "to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." *Waters*, 100 F.3d at 1441 (quoting Fed.R.Civ.P. 50 advisory committee's note to 1991 amendment). The premonition in *Waters* is precisely what happened in the instant case – Respondents/Defendants spoke sketchily at their

motions for judgment as a matter of law, content with the "late motion for judgment" results rendered five months after the verdict that were not based on any reason put forth in directed verdict motions or during the 10-day post-trial motion period. *See also Karns v. Emerson Electric Co.*, 817 F.2d 1452, 1455 n.2 (10th Cir. 1987) ("Grounds not raised in support of a motion for directed verdict may not later be raised in a motion for judgment n.o.v.").

Even the Eleventh Circuit Court of Appeals has insisted on adherence to the specificity requirement of Rule 50. In *Austin-Westshore Construction Co. v. Federated Dept. Stores, Inc.*, 934 F.2d 1217 (11th Cir.1991), the court concluded a directed verdict movant was barred from raising a theory which it did not raise until moving for JNOV. In reaching this conclusion the court noted the specificity requirement of Rule 50 "is especially strict in cases in which judgment is entered upon a general verdict." *Austin-Westshore*, 934 F.2d at 1222. The verdicts in the instant case were general verdicts.

Rule 50's specificity requirement is not idle musing. As the 1991 Advisory Committee Notes make clear:

> The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. *The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof.*

Advisory Committee Notes to 1991 Amendment to Fed.R.Civ.P. 50 (emphasis added).

Some circuit courts of appeals, however, have carved out exceptions and modifications to Rule 50. *See, e.g., Stewart v. Thigpen*, 730 F.2d 1002, 1006-07 n.2 (5th Cir.1984) (stating that the Rule 50 movant's failure to specifically identify the grounds for his motion for directed verdict did not preclude JNOV in his favor where the trial court and opposing party had "actual notice" of the basis of the motion); *cf. Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir.1993) (discussing implicit notice by Rule 50 movant). Recently the Second Circuit Court of Appeal, noting that an issue had been "central" at trial, excused a party from failure to raise the issue during it motions for judgment as a matter of law. *Gordon v. County of Rockland*, 110 F.3d 886, 887 (2d Cir.1997), *cert. denied*, 118 S.Ct. 74 (1997); *see also Urso v. United States*, 72 F.3d 59, 61 (7th Cir.1996).

These exceptions – actual notice to the court and nonmoving party, the issue being central at trial – are loosely defined and yield inconsistent results. How does "actual notice" manifest itself? Is an issue "central" at trial solely because it had been litigated in earlier proceedings? If that is true, then why didn't *Kutner*'s motion in limine suffice to put the trial court and opposing party on notice during the movant's argument for directed verdict? *Kutner*, 868 F.2d at 617.

In the case at bar, the Eleventh Circuit Court of Appeals has extended the "actual notice" exception to Rule 50 to include a trial memorandum that: (a) fails to reference any facts as adduced at trial, and (b) does not purport to be a motion for judgment as a matter of law and was never advocated as or incorporated into one by the Respondents/Defendants. Also cutting against the

"actual notice" conclusion is the fact that, even in their JNOV motion, *Respondents/Defendants did not raise probable cause as a basis to grant JNOV on the section 1983 claim.* There could hardly have been "actual notice" sufficient to defeat Rule 50 and caselaw interpreting it if Respondents/Defendants did not think the probable cause issue was plain enough to include in their JNOV motion for the section 1983 claim.

The Eleventh Circuit's ruling has disturbing implications for the Federal Rules of Civil Procedure. Is a ready-made trial memorandum now a proxy for Rule 50? If so, Rule 50 may soon be rendered ineffectual. Virtually all federal civil trials are subject to pretrial conferences and orders that give "actual notice" of issues to be tried or that delineate the "central" issues at trial. Fed.R.Civ.P. 16(c) (noting the trial court may take action with respect to, among other things, "the formulation and simplification of the issues" and "the form and substance of the pretrial order"). The fact that issues are identified before trial does not abrogate a Rule 50 movant's obligation to specify both the law and facts *as adduced at trial.* The Court should visit these issues to provide clarity among the circuits and to provide uniform application of the civil rules governing judgment as a matter of law. Further, as noted below, the consequences of the lower courts' rulings have constitutional ramifications meriting review.

Issue II. Whether Petitioners Doug and Victoria Rankin's Seventh Amendment right to a civil jury trial free from being "otherwise reexamined in any Court of the United States" was violated where the jury verdict in their

favor was vacated five months later on grounds that were not raised at trial in accordance with the Federal Rules of Civil Procedure or caselaw interpreting their application.

The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Renewed judgment as a matter of law eliminates a jury's finding of fact. "Unless a court has been alerted to deficiencies in proof by a motion for a directed verdict, a request that the court enter a judgment contrary to that of the jury is tantamount to asking the court to re-examine the facts as found by the jury. *Such a re-examination would abridge the Seventh Amendment." Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228, 233 (3d Cir.1980) (emphasis added); *see also Livingston Chemicals, Inc. v. Permviro Systems, Inc.*, 981 F.2d 1251, 1253 (4th Cir.1992) ("Without a proper motion for directed verdict, the opposing party is deprived of an opportunity to respond before the jury, thus infringing its Seventh Amendment rights."); *Food Lion v. Capital Cities/ABC, Inc.*, 984 F.Supp. 923, 930 (M.D.N.C. 1997) ("Rule 50(b) [renewed motion for judgment as a matter of law] is essentially a notice provision that, among other functions, protects the important Seventh Amendment right to a trial by jury."). Indeed, as recently as March 23, 1998, this

Court reversed on Seventh Amendment grounds a circuit court of appeals decision that set aside a jury's damage award and tried to enter judgment for a lesser amount without offering the petitioner/plaintiff the option of a new trial. *Hetzel v. Prince William County*, 118 S.Ct. 1210 (1998).

The Eleventh Circuit and trial court exceeded the proper gatekeeping function of Rule 50 and entered the impermissible realm of eliminating Seventh Amendment rights. As noted in Petitioners/Plaintiff's statement of the case, *supra*, the trial court deemed Respondents/Defendants' February 27, 1995 correspondence as a memorandum to their timely filed post-trial motion for JNOV. The trouble with this conduct, however, is that the "memorandum" raised the issue of probable cause as an entirely new basis for granting JNOV on the section 1983 claim. The action would not be so significant if it were not the *sole* basis upon which the trial court relied in granting JNOV to Respondents/Defendants.

After final judgment was entered on the jury verdicts on December 23, 1994, the Respondents/Defendants had 10 days within which to file post-trial motions. Fed.R.Civ.P. 50, 59. This time frame is not expandable. Fed.R.Civ.P. 6(b); *Meriwether v. Coughlin*, 879 F.2d 1037, 1041 (2d Cir.1989) (noting that "the rule against the discretionary enlargement of certain time periods [including Rule 50] is 'mandatory and jurisdictional and . . . cannot be circumvented regardless of excuse.' "); 9 Wright & Miller, Federal Practice and Procedure § 2537 at 601 (1971). The February 27, 1995 "memorandum," filed after Petitioners/Plaintiffs submitted their response to Respondents/Defendants' January 4, 1995 JNOV motion, was

akin to improperly raising a new basis for summary judgment after the opposing party has already responded. *Minh Tu v. Mutual Life Ins. Co.*, 136 F.3d 77, 82 (1st Cir.1998).

Alternatively, the February 27, 1995 correspondence was a belated second portion of the initial JNOV motion, and as such the trial court was without jurisdiction to consider it. Fed.R.Civ.P. 6(b). By doing so, the trial court allowed Rule 50(b) to sever Doug and Victoria Rankin's Seventh Amendment protections, and the Court should make clear that rules of civil procedure should not be used as a guillotine to truncate tenants of the Bill of Rights.

CONCLUSION

With divergent results among the circuits and Seventh Amendment rights at stake, the time has come for renewed guidance on Rule 50's application in federal trial courts across the country. The petition for writ of certiorari should be granted and the judgment of the Eleventh Circuit Court of Appeal should be reversed.

Respectfully submitted,

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APPENDIX A

Doug RANKIN, Victoria Rankin, Plaintiffs-Appellants, Cross-Appellees,

v.

Mark EVANS, Richard Willie, Sheriff of Palm Beach County, Palm Beach County Sheriff's Department, Defendants-Appellees, Cross-Appellants.

No. 95-4744.

United States Court of Appeals,
Eleventh Circuit.

Jan. 29, 1998.

Robert L. Hinkle, Radey Hinkle Thomas, Tallahassee, FL, Donald M. Hinkle, Fonvielle, FL, for Plaintiffs-Appellants, Cross-Appellees.

Marjorie Gadarian Graham, Palm Beach Gardens, FL, Monroe A. Coogler, Jr., West Palm Beach, FL, David J. Glatthorne, West Palm Beach, Fl, for Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

Before BARKETT, Circuit Judge, KRAVITCH, Senior Circuit Judge, and HARRIS*, Senior District Judge.

HARRIS, Senior District Judge:

This case, like some others involving allegations of sexual abuse of a child, inevitably evokes feelings of

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* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

compassion for all of the participants involved in the long-running dispute. However, obviously the issues must be resolved dispassionately.

Plaintiff-appellant Doug Rankin was arrested in late November of 1988 and charged with the sexual abuse of a child under the age of twelve. Thereafter, not only did a grand jury not indict him; it affirmatively found that he was "completely innocent." He and his wife, plaintiff-appellant Victoria Rankin, brought an action against the arresting officer, Deputy Sheriff Mark Evans, and the Palm Beach County Sheriff's Department under 42 U.S.C. § 1983, and also made a state claim for false arrest.

At the conclusion of the evidentiary portion of the civil trial, the district judge denied defendants' motion for a directed verdict and permitted the case to go to the jury, which returned a substantial verdict for plaintiffs. Thereafter, upon defendants' motion, the district court set aside the verdict on the ground that probable cause for Doug Rankin's arrest and detention had existed as a matter of law. That ruling is before us, as is defendants' cross-appeal of the district court's conditional denial of their motion for a new trial and its denial of their motions for remittitur and to alter or amend the judgment on the state count. We affirm the district court's grant of a JNOV and dismiss the cross-appeal as moot. (In light of the cross-appeal, for clarity we often refer to the parties as plaintiffs and defendants).

I. Factual History[1]

Plaintiffs Doug and Victoria Rankin owned and operated the Sugar Plum School House, a pre-school program located in Lake Worth, Florida. Dr. Martha Brake's three-and-a-half-year-old daughter Amber began attending Sugar Plum on November 7, 1988. On November 21, 1988, Amber made a statement to her mother, who is a child psychologist, indicating that she had been sexually abused. Dr. Brake then made an audio tape of her daughter's statement in which the child again indicated that she had been abused. That evening, Dr. Brake took her daughter to a pediatrician, Dr. Drummond, to be examined for possible evidence of abuse. During the examination, Dr. Drummond found physical signs which were consistent with sexual abuse. The next morning, Dr. Brake went to Amber's prior school – Victory Baptist – and played the tape in an attempt to get Amber readmitted to that school. At approximately nine o'clock that morning, Dr. Brake called the sheriff's department to inform it that she had proof that her daughter had been sexually molested. Deputy Mark Evans, who was

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[1] In analyzing the factual history, we have viewed all facts in the light most favorable to plaintiffs and have drawn all reasonable inferences in their favor. *See Bailey v. Board of County Comm'rs of Alachua County*, 956 F.2d 1112, 1119 (11th Cir.), *cert. denied*, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992). However, this presumption in favor of plaintiffs does not apply where no jury could reasonably conclude that the evidence supported a certain factual finding or inference, despite minor conflicts in the record. *Id.* (stating that a "mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to create a jury question").

assigned to the case, called Dr. Brake and scheduled an interview with her and Amber for that morning.

Deputy Evans and a representative from the Florida Department of Health and Rehabilitation Services and Victim's Services (HRS) interviewed Dr. Brake while another officer observed Amber. Dr. Brake informed Evans that: (1) Amber had made a spontaneous statement to her which indicated that she had been molested by a person named Ba Ba Blue; (2) she had heard Amber refer to Doug Rankin as Ba Ba Blue on several occasions and had never heard her refer to anyone else by that name; (3) a teacher had informed her that children frequently called Doug Rankin Baba Loo;[2] (4) Doug Rankin worked at the school, Sugar Plum, which Amber attended; (5) the only men who had had access to Amber in the recent past were Rankin and one of Dr. Brake's coworkers; (6) she had seen Rankin on the playground with the children; (7) Amber had attended Sugar Plum for about two weeks; (8) Amber started exhibiting behavioral changes starting at the end of her first week at the school;[3] (9) Amber had used the age-inappropriate term "boobies" in reference to

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[2] It is uncontested that Baba Loo was a nickname used for Rankin by the children, and that Amber pronounced this name as Ba Ba Brue or Ba Ba Blue. Accordingly, we use the term "Ba Ba Blue" whenever we refer to Amber's statements regarding Baba Loo. When referring to another party's independent use of the term, we use the term "Baba Loo."

[3] Dr. Brake testified that she told Evans that Amber initially enjoyed school, but that her behavior had changed significantly by the end of the first week. She told Evans that Amber had become more withdrawn, had indicated that she did not want to go to school, had become more clingy, and had begun having nightmares.

her chest after starting school at Sugar Plum; (10) Dr. Brake was so disturbed by Amber's behavioral changes that she tried to get her re-enrolled at her prior school, Victory Baptist; (11) Dr. Brake saw Rankin pick Amber up, and Amber hit him in response, on the day that Amber made her initial statement indicating sexual abuse; (12) it was unusual for Amber to strike an adult; (13) Dr. Brake had had an argument with Rankin regarding what she considered to be insufficient supervision of the children; (14) she had taken Amber to be examined by Dr. Drummond (their pediatrician) the day Amber made her initial statement, and he told Dr. Brake that there was physical evidence consistent with abuse; and (15) a colleague of hers who was also a child psychologist, Dr. Decharme, had seen Amber on the evening of November 21, 1988, and told Dr. Brake that Amber had indicated that she had been abused.

Dr. Brake also informed Evans that she had made an audiotape of Amber's recounting of her previous statement. Evans listened to that tape. On it, Amber stated that Ba Ba Blue had made "a hole in [her] bottom" and that he put "his fingers in [her] bottom and it pinched and it feels bad." She also indicated that, after Ba Ba Blue was finished with her, he sent her to the playground.

Officer Honholz, who had been with Amber during Evans's interview of her mother, informed Evans and Dr. Brake that Amber made a statement to him regarding the abuse.

Deputy Evans then conducted a videotaped interview with Amber in which she again indicated that a man at school named Ba Ba Blue had abused her. Prior to

identifying Ba Ba Blue as her abuser, Amber named two cartoon characters in response to police questioning regarding the identity of her abuser. Baba Loo is the name of a cartoon character from a video the children watched in school. Rankin used the term as a general nickname to refer to the children. The children, including Amber, also referred to Rankin by this nickname.

Amber also made several improbable or inconsistent statements regarding the timing of the abuse. She indicated that the abuser had used both his hand and a spoon, taken pictures of her, touched her with his genitalia, and had been naked. She also indicated that the abuse had happened both inside the school and outside on some steps.

Deputy Evans telephoned Dr. Drummond regarding Amber's physical examination. Dr. Drummond told Evans that there were several physical symptoms that could be the result of sexual abuse: (1) a fresh abrasion; (2) an enlarged hymenal opening; and (3) a healed notch on the hymen. Dr. Drummond indicated that the first symptom could be consistent with improper sexual conduct such as rubbing, but that there were other possible causes. Dr. Drummond stated that the hymenal notch and the enlargement of the area suggested some form of limited penetration – possibly digital. Dr. Drummond also noted that the notch to the hymen was at least two to three weeks old.

On the morning of November 23, 1988, with the authorization of his superiors, Evans went to Sugar Plum to arrest Doug Rankin for sexual battery on a child under the age of twelve. Rankin was not there. Evans did not

inform anyone at the school of the purpose of his visit, nor did he interview anyone at the school regarding the alleged abuse. Instead, he returned several hours later, when he had been informed Rankin would be present, at which time he arrested Rankin.

During his subsequent interview with police, Rankin repeatedly proclaimed his innocence and informed Evans that he had never been alone with Amber (a fact that he asserted the teachers could corroborate), that he was physically unable to fit on or reach into the playground equipment on which the police stated that the abuse occurred, that Baba Loo was the name of a cartoon character, that he was not the only person at the school who was called Baba Loo, and that Amber had attended the school for only two weeks.

During his interview, Rankin also conceded that he was the only male who worked at the school, that the children referred to him as Baba Loo, that he had access to the entire schoolhouse, and that he had been at school on November 21, 1988. He also made numerous specific comments regarding Amber's personality and behavior during the two weeks she had been at school, even though he stated that there were 120 students at the school and that he had relatively little contact with the children. Furthermore, he made progressively more critical comments regarding Dr. Brake as the interview proceeded.

Following the interrogation, Rankin formally was charged with sexual battery of a child under the age of twelve pursuant to Fla. Stat. 794.011(2). He subsequently was released on bond with no opposition from Deputy

Evans. A grand jury later exonerated Rankin, specifically stating that he was "completely innocent."

II. Procedural History

Following those events, plaintiffs Doug Rankin and his wife Victoria filed a complaint asserting both state and federal claims. The claims resolved by the jury at trial were as follows.[4] Count I stated a claim pursuant to 42 U.S.C. § 1983 alleging that defendant Mark Evans, as a Deputy Sheriff of Palm Beach County, while acting under the color of state law, arrested and seized plaintiff Doug Rankin without a warrant or probable cause in violation of the Fourth and Fourteenth Amendments of the United States Constitution. Count II alleged that defendant Richard Wille, as Sheriff of the Palm Beach County Sheriff's Department, acting through its agents and employees, falsely arrested and imprisoned plaintiff Doug Rankin.[5] At trial, defendants made a motion for a directed verdict

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[4] It should be noted that Sheriff Richard Wille was originally named as a defendant in Count I, but was dismissed prior to trial. The Sheriff's Department was named as a defendant in both Counts I and II. However, summary judgment was entered in the Department's favor on Count I, and thus it remained as a defendant only in Count II. Richard Wille subsequently was substituted for the Palm Beach County Sheriff's Department in Count II. Accordingly, at trial, Deputy Mark Evans was the defendant in Count I and Richard Wille, as the Sheriff, was the defendant in Count II.

[5] Although Count II alleges both false arrest and false imprisonment, we refer to the claim as one for false arrest because under Florida law "false arrest and false imprisonment are different labels for the same cause of action." *Weissman v. K-Mart Corp.*, 396 So.2d 1164, 1164 n. 1 (Fla. 3d DCA 1981).

both at the close of plaintiffs' case and at the close of all evidence.[6] At neither time did defendants specifically state their grounds for the motion for a directed verdict. The trial court denied both motions, and the case went to the jury, which found defendants liable on both counts.[7]

On January 4, 1995, defendants filed motions for a judgment notwithstanding the verdict, for remittitur, to alter or amend the judgment on the state count, and alternatively for a new trial. Defendants based their motion for a JNOV on the asserted existence of probable cause for the arrest.[8] The motion also asserted that

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[6] We note that the 1991 Amendments to Rule 50 of the Federal Rules of Civil Procedure changed the terminology used to describe the relevant actions taken. Instead of using the term "directed verdict" for a motion for a judgment as a matter of law when the motion is made prior to the verdict, and the term "judgment notwithstanding the verdict" when the motion is made after the verdict is returned, Rule 50 now refers to both motions as motions for a judgment as a matter of law. However, since one issue on appeal turns on the timing of the motion for the judgment as a matter of law, we use the older terms "directed verdict" and "judgment notwithstanding the verdict" for convenience and clarity.

[7] The jury awarded Doug Rankin $1,000,000 for intangible damages, damage to personal reputation, and loss of past income and earning potential. Victoria Rankin was awarded $500,000 as damages for loss of consortium. The Rankins also were awarded $500,000 as business damages.

[8] Plaintiffs contend that defendants failed properly to raise probable cause as the ground for a JNOV on the § 1983 claim because they did not assert that ground until their reply to plaintiffs' opposition to the motion for a JNOV. We reject this argument.

On January 4, 1995 – the date on which defendants' motions for a JNOV, for remittitur, to alter and amend the judgment on

defendants were entitled to a JNOV on the § 1983 claim because plaintiffs failed to demonstrate that Deputy Evans acted with deliberate or callous indifference to Doug Rankin's constitutional rights, as required to support a § 1983 claim. On May 15, 1995, the district court granted defendants' motion for a JNOV on both the state and federal claims on the ground that probable cause for Rankin's arrest and detention existed and constitutes an absolute bar to plaintiffs' claims. The Order also conditionally denied defendants' motion for a new trial and denied their other motions as moot.

Plaintiffs appeal the grant of a JNOV in favor of defendants on both counts. Defendants appeal the conditional denial of the motion for a new trial and the denial of their other motions as moot.

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the state claim, and for a new trial were filed – defendants also filed a motion for an extension of time in which to file addenda to those motions. Confusion as to the district court's position regarding this request for an extension of time prompted the district court to treat defendants' February 28, 1995, reply to plaintiffs' opposition as an addendum to defendants' original motion for a JNOV. *See* March 16, 1995, Order (detailing the procedural history regarding this matter). The Order explicitly stated that plaintiffs were entitled to respond pursuant to the Local Rules to defendants' February 28, 1995, submission. Certainly, it was well within the district court's discretion to treat defendants' reply as an addendum to its original motion in an attempt to remedy any procedural confusion resulting from its Orders. Accordingly, we reject the assertion by plaintiffs that probable cause was not raised in defendants' motion for a JNOV as a ground for relief.

III. Analysis

A. The Grant of a JNOV Was Not Procedurally Barred

The first question we decide is whether the district court's grant of a JNOV in favor of defendants was procedurally barred. The Rankins correctly assert that Federal Rule of Civil Procedure 50(b) requires that a party moving for a JNOV first must have made a timely and proper motion for a directed verdict. *See Wilson v. Attaway*, 757 F.2d 1227, 1237 (11th Cir.1985). Federal Rule of Civil Procedure 50(a)(2) states that such a motion "shall specify . . . the law and the facts on which the moving party is entitled to the judgment." *See also National Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1548 (11th Cir.1986). The Rankins note that defendants failed to state specifically any ground for their motions for a directed verdict – much less the ground on which the Court later granted a JNOV, *i.e.*, the existence of probable cause. Therefore, the Rankins contend that defendants' motions for a directed verdict did not satisfy the specificity requirement of Rule 50(a)(2), and that defendants' motion for a JNOV should have been denied as technically deficient. *See, e.g., Piesco v. Koch*, 12 F.3d 332, 340-41 (2d Cir.1993) (defendant's motion for a directed verdict failed to specify any grounds and thus was not sufficiently informative to preserve defendant's right to move for a JNOV); *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956-57 (5th Cir.1993) (issue raised in a JNOV motion that was not specifically raised in motion for a directed verdict at close of evidence held waived); *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1555-56 (7th Cir.1987) (same).

Defendants argue that a rigid application of Rules 50(b) and 50(a)(2) is inappropriate where motions for a directed verdict were timely made and the judge and opposing counsel were aware of the legal and factual bases of the motion despite the moving party's failure to state them explicitly. *See, e.g., Stewart v. Thigpen,* 730 F.2d 1002, 1006-07 n. 2 (5th Cir.1984) (stating that plaintiff's failure specifically to identify the grounds for his motion for a directed verdict did not preclude a JNOV in his favor where the trial court and defendants had actual notice of the basis of the motion); *Clarke v. O'Connor,* 435 F.2d 104, 113 n. 15 (D.C.Cir.1970) (concluding that although defendant's motion for a directed verdict did not explicitly assert the applicability of the statutory provision on which a JNOV later was based, it provided the court and opposing counsel with sufficient notice to satisfy Rule 50). Defendants assert that the trial court and opposing counsel were aware that defendants' motions for a directed verdict were based upon the ground that probable cause for Rankin's arrest existed as a matter of law and constituted an absolute defense to plaintiffs' claims.

In support of this contention, defendants stress that it was obvious throughout trial that the existence of probable cause was the central issue in the case. Defendants note that on the day before they made their motions for a directed verdict, they submitted a trial memorandum briefing the issue of probable cause. The trial judge referred to this memorandum and specifically alluded to a probable cause case that was discussed therein in denying defendants' motion for a directed verdict at the close of plaintiffs' case. The trial judge subsequently denied

defendants' motion for a directed verdict at the close of all evidence "on the basis previously announced at the close of the plaintiffs' case in chief." Accordingly, defendants argue, since it was apparent to all involved that the existence of probable cause was the basis for its motions for a directed verdict, the district court did not err in granting defendants' motion for a JNOV on that ground.

This Circuit has looked to the purpose of Rule 50(b) in determining what constitutes a motion for a directed verdict sufficient thereafter to support a JNOV. *See National Indus.*, 781 F.2d at 1549-50 (noting that where Rule 50(b)'s purpose – providing notice to the court and opposing counsel of any deficiencies in the opposing party's case prior to sending it to the jury – has been met, the Circuit "ha[s] taken a liberal view of what constitutes a motion for directed verdict").[9] *See also Scottish Heritable Trust v. Peat Marwick Main & Co.*, 81 F.3d 606, 610 (5th Cir.) (stating that "[t]echnical noncompliance with Rule

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[9] The Rankins cite *Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc.*, 934 F.2d 1217, 1222-23 (11th Cir.1991), in support of their contention that Rules 50(b) and 50(a)(2) should be strictly applied to bar the grant of a JNOV in this case. In *Austin*, however, the ground on which the motion for a JNOV was based had never been raised at trial. Thus, the trial court could not rely upon the standard articulated in *National Industries* in support of a grant of a JNOV because opposing counsel and the trial court did not have actual notice as to any "flaw" in the case prior to sending it to the jury. Unlike in *Austin*, the grant of a JNOV in this case is justified by the fact that the moving parties substantially complied with the requirements of Rules 50(a)(2) and (b) because the court and opposing counsel unquestionably had actual notice at trial of the ground upon which the JNOV ultimately was granted.

50(b) may be excused in situations in which the purposes of the rule are satisfied"), *cert. denied*, ___ U.S. ___, 117 S.Ct. 182, 136 L.Ed.2d 121 (1996); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3rd Cir.1993) (concluding that defendants' motions for a directed verdict were sufficient to support a JNOV where the court and opposing counsel had actual notice of the basis of the motion even though it was only implicitly raised by defendants' motions). A party is obliged to make a motion for a directed verdict at the close of the evidence as a prerequisite to a motion for JNOV to ensure that neither the court nor the opposing party is "lulled into complacency" concerning the sufficiency of the evidence. *National Indus.*, 781 F.2d at 1549. *See also Scottish Heritable*, 81 F.3d at 610 (stating that "the two basic purposes of [Rule 50(b)] are 'to enable the trial court to re-examine the question of evidentiary sufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury' ") (internal citation omitted). Requiring a motion for a directed verdict prior to submitting the case to the jury ensures that the court and the opposing party will be alerted to any sufficiency problems at a stage when such deficiencies might be remedied.

The same purpose underlies the specificity requirement of Rule 50(a)(2). Accordingly, where the trial court and all parties actually are aware of the grounds upon which the motion is made, strict enforcement of the specificity requirement of Rule 50(a)(2) is unnecessary to serve the purpose of the rule.

The record shows that the trial court and plaintiffs' counsel were aware that the asserted existence of probable cause formed the basis of defendants' motions for a directed verdict. That issue was the central question in the case; defendants submitted a trial memorandum on that issue on the day prior to making their motions for a directed verdict; and the trial judge referred to that memorandum, and more specifically to a particular probable cause case, in making his rulings on defendants' motions for a directed verdict. Accordingly, we conclude that defendants' motions for a directed verdict were sufficient to support their subsequent motion for a JNOV.

B. Probable Cause as the Ground for the Entry of a JNOV

1. The Relevance of the Arresting Officer's Subjective Belief in the Arrestee's Guilt to the Existence of Probable Cause

We now turn to plaintiffs' argument that Florida law requires an arresting officer to believe subjectively in the guilt of an arrestee in order to have probable cause for the arrest. Under this view of the law, the Rankins contend that a reasonable jury could have concluded that Deputy Evans did not subjectively believe in Rankin's guilt and, thus, that he did not have probable cause to arrest Rankin. They further argue that such an arrest would have exceeded state authority, thus violating Rankin's Fourth Amendment rights and rendering defendants liable for that violation pursuant to 42 U.S.C. § 1983. Defendants counter that no such subjective belief requirement exists under Florida law. We conclude that

neither Florida nor federal law requires that a police officer actually have a subjective belief in the guilt of the person arrested.

This Circuit has concluded that the standard for determining the existence of probable cause is the same under both Florida and federal law – whether " 'a reasonable man would have believed [probable cause existed] had he known all of the facts known by the officer.' " *United States v. Ullrich*, 580 F.2d 765, 769 (5th Cir.1978) (quoting *State v. Outten*, 206 So.2d 392, 397 (Fla.1968)).[10] *See also United States v. McDonald*, 606 F.2d 552, 553 n. 1 (5th Cir.1979) (*per curiam*) (stating that "Florida's standard of probable cause for a lawful arrest is the same as that required by the Fourth Amendment"); *Wright v. State*, 418 So.2d 1087, 1094 (Fla. 1st DCA 1982) (concluding that the Florida standard for probable cause is no more restrictive than the federal standard and is in effect a mirror image of that standard). Furthermore, prior to its adoption of the proposition that the state and federal probable cause standards are identical, this Circuit explicitly rejected the idea that the subjective belief of the arresting officer is relevant to the determination of whether probable cause exists. *See United States v. Clark*, 559 F.2d 420, 425 (5th Cir.) (stating that "even if the officers felt that probable cause was lacking, an objective standard would still be applicable"), *cert. denied*, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977); *United States v.*

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[10] All decisions issued by the former Fifth Circuit prior to October 1, 1981, have been adopted as binding precedent for the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

Resnick, 455 F.2d 1127, 1132 (5th Cir.1972) (concluding that probable cause existed and "the scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer").[11] Finally, relying on

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[11] We here address plaintiffs' citation of several decisions which they contend establish that an officer must subjectively believe that a crime has been committed and that the suspect committed it in order for probable cause to exist. *See Spicy v. City of Miami*, 280 So.2d 419, 421 (Fla.1973) (stating that an officer "must have . . . 'substantial reason' and must 'believe' from observation and evidence at the point of arrest" that the person was guilty); *Osborne v. State*, 87 Fla. 418, 100 So. 365, 366 (1924) (officer has probable cause to arrest "any person whom such officer has reasonable ground to believe, and does believe, has committed any felony"); *City of Hialeah v. Rehm*, 455 So.2d 458, 461 (Fla. 3d DCA 1984) (reversing a directed verdict in favor of defendant on false arrest and imprisonment claims, because "jury issues were presented as to a) whether, when he placed [the suspect] under arrest, [the arresting officer] in fact himself believed that the offense . . . had been committed . . . ; and b) whether, if so, there was a reasonable basis for that belief in the circumstances he observed"); *Donner v. Hetherington*, 399 So.2d 1011, 1012 (Fla. 3d DCA 1981) (same). We note that *Osborne* and *Spicy* were decided prior to the Eleventh Circuit authority described in the text above which rejects the proposition that there is a subjective element to a probable cause analysis. We must therefore presume that this Circuit considered *Osborne* and *Spicy* in the decisions which collectively rejected that proposition. We are bound by this precedent because "a prior decision of the circuit (panel or en banc) [cannot] be overruled by a panel but only by the court sitting en banc." *Bonner*, 661 F.2d at 1209.

Both *Donner* and *Rehm*, which are state appellate-level decisions decided after the referenced Eleventh Circuit authority, cite *Spicy* as their sole authority for the proposition that there is a subjective element to the state probable cause analysis. *Donner*, 399 So.2d at 1012; *Rehm*, 455 So.2d at 461. As

its own precedent dating back to 1973, the Supreme Court recently stated: "Subjective intentions play no role in

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noted, this Circuit has concluded that *Spicy* does not stand for the proposition for which plaintiffs cite it.

However, even if we were not so bound, we would not conclude that the cases cited by plaintiffs establish that there is a subjective element to the probable cause analysis under Florida law. Our research indicates that no other Florida appellate jurisdiction has joined the Third District's adoption of an explicit two-part probable cause analysis requiring an officer subjectively to believe that probable cause exists and have a reasonable basis for that subjective belief. The other jurisdictions appear to rely on an objective standard: probable cause exists when "the totality of the facts and circumstances within the officer's knowledge would cause a reasonable person to believe that an offense has been committed and that the defendant is the one who committed it." *Revels v. State*, 666 So.2d 213, 215 (Fla. 2d DCA 1995); *see also Florida Game and Freshwater Fish Comm'n v. Dockery*, 676 So.2d 471, 474 (Fla. 1st DCA 1996); *Millets v. State*, 660 So.2d 789, 791 (Fla. 4th DCA 1995); *LeGrand v. Dean*, 564 So.2d 510, 512 (Fla. 5th DCA 1990). *But see LeGrand*, 564 So.2d at 513 (Griffin, J., specially concurring) (citing *Donner* and *Spicy* for the proposition that an officer must "actually have a belief that a crime was committed and that the people he proposes to arrest perpetrated the crime"). Finally, the Florida Supreme Court again defined the test for probable cause in objective terms after *Donner*. *See Blanco v. State*, 452 So.2d 520, 523 (Fla.1984) ("The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe the person has committed a felony."), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985). Thus, *Donner* and *Rehm* do not represent any significant shift in Florida law that would affect this Circuit's conclusion that the subjective belief of the arresting officer plays no role in a probable cause analysis under either Florida or federal law.

ordinary, probable-cause Fourth Amendment analysis."[12] *Whren v. United States*, 517 U.S. 806, ___, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996). Thus, when this Circuit concluded that state and federal probable cause standards are identical, it was clearly established under federal law that there was no subjective belief requirement. No subjective belief requirement exists under either state or federal law.[13]

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[12] The Court also stated: "Not only have we never held, outside the context of inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Whren*, 517 U.S. at ___, 116 S.Ct. at 1774; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 2577 n. 3, 77 L.Ed.2d 22 (1983) (rejecting the contention that an ulterior motive might strip officers of their legal justification for an otherwise lawful warrantless boarding of a ship); *Scott v. United States*, 436 U.S. 128, 136-38, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978) (rejecting the contention that the Fourth Amendment required the exclusion of certain wiretap evidence and accepting the government's position that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional"); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (characterized by *Scott*, 436 U.S. at 136-38, 98 S.Ct. at 1723, as holding that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action").

[13] Plaintiffs also cite *Tillman v. Coley*, 886 F.2d 317, 321 (11th Cir.1989), as providing support for the existence of a subjective element to the probable cause analysis. In that case we concluded that a reasonable officer would investigate serious doubts regarding the identity of a suspect prior to arrest, and held that no "reasonable law enforcement officer may conclude

2. The Existence of Probable Cause

The Rankins assert that the trial court erred in granting a JNOV in favor of defendants because a reasonable jury could have concluded that the arresting officer, Deputy Evans, did not have probable cause to arrest or detain Doug Rankin. Defendants contend that the trial court was correct in ruling that Evans had probable cause to arrest Rankin as a matter of law. We conclude that probable cause to arrest Rankin existed as a matter of law, and, accordingly, we affirm the trial court's grant of a JNOV in favor of defendants.

In determining whether a JNOV was properly granted, we apply the same standard as the district court. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir.1989). Resolving all the factual disputes and drawing all logical inferences in favor of the nonmoving party, we determine whether these facts and inferences so strongly favor one party "that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict." *Bailey v. Board of County Comm'rs of Alachua County*, 956 F.2d 1112, 1119 (11th Cir.), *cert. denied*, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 58 (1992). If so, the motion was properly granted. We must also keep in mind, however, that a "mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to create a jury question." *Id.*

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that . . . an arrest [may be] made for the sole purpose of identifying a suspect." *Id.* Plaintiffs' use of this limited holding in support of a subjective belief requirement is unpersuasive in light of Eleventh Circuit and Supreme Court precedent.

As noted, the trial court granted a JNOV in favor of defendants on the ground that the arresting officer had probable cause to arrest Rankin as a matter of law. Since probable cause constitutes an absolute bar to both state and § 1983 claims alleging false arrest, the remaining question for us to address is whether the trial court correctly concluded that probable cause did exist as a matter of law. *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir.1996) (probable cause constitutes an absolute bar to a § 1983 claim alleging false arrest); *Bolanos v. Metropolitan Dade County*, 677 So.2d 1005, 1005 (Fla. 3d DCA 1996) ("[P]robable cause is a complete bar to an action for false arrest and false imprisonment.") (*per curiam*). Accordingly, "we . . . must evaluate [the] facts and inferences according to the legal standard for probable cause." *Bailey*, 956 F.2d. at 1119.

As has been discussed, the standard for determining whether probable cause exists is the same under Florida and federal law. *McDonald*, 606 F.2d at 553 n. 1. In order for probable cause to exist, "an arrest [must] be objectively reasonable under the totality of the circumstances." *Bailey*, 956 F.2d at 1119; *see also State v. Scott*, 641 So.2d 517, 519 (Fla. 3d DCA 1994). This standard is met when "the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir.1995); *see also Elliott v. State*, 597 So.2d 916, 918 (Fla. 4th DCA 1992). "Probable cause requires more than mere suspicion, but does not require convincing proof." *Bailey*, 956 F.2d at

1120; *see also Scott*, 641 So.2d at 519 ("[T]he facts necessary to establish probable cause need not reach the standard of conclusiveness and probability as the facts necessary to support a conviction."). In determining whether probable cause exists, " 'we deal with probabilities . . . [which] are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Revels*, 666 So.2d at 215 (quoting *Illinois v. Gates*, 462 U.S. 213, 229-31, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983)).

An arresting officer is required to conduct a reasonable investigation to establish probable cause. *See Tillman*, 886 F.2d at 321; *see also Harris v. Lewis State Bank*, 482 So.2d 1378, 1382 (Fla. 1st DCA 1986) ("Where it would appear to a 'cautious man' that further investigation is justified before instituting a proceeding, liability may attach for failure to do so, especially where the information is readily obtainable, or where the accused points out the sources of the information."). An officer, however, need not take "every conceivable step . . . at whatever cost, to eliminate the possibility of convicting an innocent person." *Tillman*, 886 F.2d at 321; *see also State v. Riehl*, 504 So.2d 798, 800 (Fla. 2d DCA 1987) ("In order to establish the probable cause necessary to make a valid arrest, . . . it is not necessary to eliminate all possible defenses."). Furthermore, once an officer makes an arrest based upon probable cause, he "need not 'investigate independently every claim of innocence.' " *Tillman*, 886 F.2d at 321 (internal citation omitted). Probable cause is "judged not with clinical detachment but with a common sense view to the realities of normal life." *Marx v. Gumbinner*, 905 F.2d 1503,

1506 (11th Cir.1990) (internal citation omitted); *see also Revels*, 666 So.2d at 215.

The only difference in the probable cause analysis applicable to the state and federal claims at issue here is which party carried the burden of proving whether probable cause existed. The existence of probable cause constitutes an affirmative defense to the claims of false arrest and imprisonment under Florida law. *See Bolanos*, 677 So.2d at 1005 (probable cause bars a state claim for false arrest or false imprisonment); *DeMarie v. Jefferson Stores, Inc.*, 442 So.2d 1014, 1016 n. 1 (Fla. 3d DCA 1983) ("[T]he existence of probable cause is a part of the defense to a false arrest action which must be shown by the defendant."). Accordingly, defendants had the burden of demonstrating the existence of probable cause as a defense to the state claim. However, plaintiffs had the burden of demonstrating the absence of probable cause in order to succeed in their § 1983 claim. *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir.1997) ("In order to establish a Fourth Amendment violation, [plaintiff] must demonstrate that a seizure occurred and that it was unreasonable."); *see also Rivas v. Freeman*, 940 F.2d 1491, 1496 (11th Cir.1991) ("To successfully litigate a lawsuit for deprivation of constitutional rights under 42 U.S.C. section 1983, a plaintiff must show violation of a constitutionally protected liberty or property interest and deliberate indifference to constitutional rights."). We conclude that probable cause existed as a matter of law and that the existence of such probable cause defeats both the federal and state claims.

The Rankins first assert that the evidence on which Deputy Evans relied in making the arrest either exonerated Doug Rankin or was not sufficiently trustworthy or

reliable to support a finding of probable cause. They assert that the medical evidence of which Evans was aware compelled the conclusion that Rankin was not Amber's abuser because it suggested that the charged conduct had occurred prior to Rankin's first contact with the child. They also contend that the physical evidence exonerated Rankin because he could not physically have committed the acts of which he was accused in the location identified by the victim. Additionally, the Rankins contend that Rankin's lack of access to Amber defeated probable cause for his arrest, especially in light of the fact that Evans knew that another male, one of Dr. Brake's coworkers, had had access to Amber during a time frame consistent with the medical evidence suggesting penetration.

The Rankins also contend that Evans should not have relied on Amber's or Dr. Brake's statements about possible abuse when determining probable cause. They claim that Amber's statements regarding abuse were unreliable because of: (1) her age; (2) inconsistencies regarding the identity of the abuser, the number of times the abuse occurred, and the location and timing of the abuse; (3) the possibility that Dr. Brake, a child psychologist, concocted the story that Amber spontaneously told her about the abuse and that Dr. Brake's coaching resulted in Amber's subsequent statements; and (4) the possibility that the police officers' questions during their interview with Amber led her into making statements that she would not otherwise have made. They further contend that Evans should have viewed Dr. Brake's statements with considerable skepticism because he should have known that Dr. Brake was biased against Rankin due to their argument

regarding the school's supervision of the children under its care. They also seem to suggest that Evans should have considered the possibility that either Dr. Brake or somebody she was protecting committed the abuse. Accordingly, they conclude that Evans should have placed little weight on Dr. Brake's comments regarding Amber's behavior and statements.

Finally, the Rankins argue that, at the very least, the information available to Evans at the time of the arrest should have created doubts as to the existence of probable cause and should have prompted further investigation. The Rankins claim that Evans should have examined the playground equipment to determine whether Rankin could have abused Amber on the steps of that equipment as her statements indicated. They also argue that Evans should have interviewed the teachers regarding Amber's behavior at school and Rankin's degree of access to Amber. Although the Rankins contend that this investigation should have been done prior to arresting Rankin, they further assert that it certainly should have been done after Rankin raised concerns regarding these issues during his interview with the police. Plaintiffs contend that such additional investigation was especially important here because time was not of the essence in making an arrest since the school was going to be closed over the Thanksgiving holidays, limiting Rankin's access to the children.

Defendants counter that Evans's conclusion that probable cause existed to arrest Rankin was well-supported by the evidence available to him at the time of Rankin's arrest and detention. Defendants note that

Evans interviewed Amber, Dr. Brake, and Dr. Drummond, all of whom provided information supporting the conclusion that Rankin had abused Amber.

Defendants also contend that Evans's interviews with Amber and her mother, his conversation with Dr. Drummond, and his interrogation of Rankin in which Rankin made several damaging statements constituted a reasonable investigation and provided trustworthy and reliable information from which he could conclude that probable cause existed both at the time of arrest and during Rankin's subsequent detention. They further contest plaintiffs' assertion that time was not of the essence in making the arrest. They note that had Rankin not been arrested on the morning of November 23, he would have had access to the children at the school for the entire day.

We conclude that the investigation conducted by Evans was reasonable and that the evidence on which he based his decision to arrest Rankin was sufficient to create probable cause as a matter of law. We also conclude that the statements made by Rankin after his arrest did not defeat the existence of probable cause or necessitate immediate further investigation.

a. The Medical Evidence

We now address plaintiffs' assertion that the medical evidence available to Evans precluded the existence of probable cause to arrest Rankin for the crime with which he was charged. The Rankins note that penetration is an element of the crime of sexual abuse of a child under twelve. *See* § 794.011 Fla. Stat. (1987). Resolving all factual

disputes in favor of the plaintiffs, we must conclude that Evans knew that the injury suggesting such penetration had been incurred at least two weeks before the date of Dr. Drummond's examination and that Evans knew that Amber had attended Sugar Plum for just two weeks. We also must conclude that Dr. Brake told Evans that Amber had told her that abusive behavior had occurred on November 21, 1988, a date which seemingly conflicts with the medical evidence that penetration (if only partial) had occurred at least two weeks prior to that date.[14] Accordingly, the question to be answered is whether a prudent person faced with such information could reasonably have believed that Rankin committed the offense.

In addition to that information, however, Deputy Evans also knew that Amber had sustained a fresh abrasion within 24 hours of the November 21, 1988, medical examination which could have been caused by a fingering of the genital area. During her videotaped interview, Amber indicated that abusive incidents occurred on more than one occasion. Thus, Amber's statements and the medical evidence both suggested that more than one

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[14] The parties disputed this at trial. Evans testified that Dr. Brake told him that the date on which Amber told her about the incident with Ba Ba Blue was November 21, but that Dr. Brake gave him a time frame of November 7 to November 21 during which the actual incident or incidents of abuse could have occurred. Plaintiffs confronted Evans at trial with his arguably conflicting deposition testimony in which he indicated that Dr. Brake told him that Amber said that the abuse occurred on November 21, 1988. In light of this conflicting evidence, we must accept plaintiffs' assertion as true.

instance of abuse occurred, and a prudent officer reasonably could have concluded that a single individual, rather than two separate individuals, was responsible for the alleged abuse. Furthermore, an officer reasonably could have concluded that Rankin was that individual.

Evans knew that Amber consistently had called her alleged abuser Ba Ba Blue and repeatedly linked the alleged abuse to the school. He knew that Rankin was the only person whom Amber called by that name. Amber repeatedly referred to her abuser as a "he," and Dr. Brake told Evans that Rankin was the only male who had access to Amber during the approximately two-week period which was consistent with all of the medical evidence.[15] Dr. Brake also informed Deputy Evans that, after Amber started school at Sugar Plum, her behavior and language had changed in ways which Evans knew to be consistent with sexual abuse.

Plaintiffs assert that even if the abuse could have occurred on the first day on which Amber attended Sugar Plum, which would have placed the incident involving penetration within a time frame consistent with Rankin's

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[15] Amber attended Sugar Plum for two weeks, and Dr. Drummond indicated that the injury suggesting penetration was at least two weeks old. Thus, accepting as true that Evans knew of Dr. Drummond's time line, an overlap of approximately a day existed during which a cautious officer reasonably could have concluded that Rankin could have committed the charged offense. We further note that an officer reasonably could have concluded that the time frame given by the doctor was an estimate and not necessarily a strict cut-off point, thus possibly expanding the window of opportunity by a reasonable period of time.

guilt, Evans knew that Amber had stated that abuse had occurred on November 21, 1988, which was clearly inconsistent with the medical time frame for the act of penetration. However, the relevant question is whether a prudent officer reasonably could have believed that Rankin committed the offense in light of the medical evidence suggesting that any penetration had to have happened significantly before November 21, 1988, and Dr. Brake's statement that Amber indicated that the abuse occurred on November 21, 1988.

In light of the evidence suggesting multiple incidents of abuse, a prudent officer reasonably could have believed that, in recounting her story to her mother, Amber might not have distinguished between penetration and simple fingering or rubbing. Thus, in recounting the abuse she could have conflated the incidents or confused the dates, or, in talking to her mother, she could have been referring to the conduct which may have resulted in the abrasion. A cautious officer, therefore, reasonably could have believed that multiple incidents of abuse occurred and that the abuse with which Rankin was charged occurred within the first few days of school – which was within the medically permissible time frame. Accordingly, a reasonable jury could not have concluded that the medical evidence defeated probable cause to arrest Rankin.

b. Access

The Rankins next assert that, even if the medical evidence does not conclusively defeat probable cause, Rankin's lack of access to Amber while she was at school

does. They contend that, had Evans interviewed any of the teachers before arresting Rankin, he would have realized that Rankin was never alone with Amber and, thus, could not have abused her. Plaintiffs further note that it is uncontested that Rankin informed Evans of his lack of access to Amber during questioning after he was arrested. They thus contend that Evans knew or should have known that Rankin was never alone with Amber and that he therefore lacked the opportunity to have committed the crime charged.

Defendants counter that Deputy Evans knew that Rankin was present at the school during the relevant time frame and that he moved freely throughout the school. Evans also knew that Dr. Brake had observed what she perceived to be a lack of adequate supervision of the children. Finally, defendants contend that a reasonable officer could have concluded that the abuse – partial penetration by a finger and rubbing of Amber's genitalia – could have occurred with others in the room if the abuser had his body between any other adult and the child and he simply slipped his hand down the front of Amber's pants or skirt.[16]

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[16] The Rankins note that, in Amber's videotaped interview, she indicated that Ba Ba Blue touched her with both a finger and a plastic spoon. The Rankins assert that a reasonable officer could not possibly believe that Rankin could penetrate Amber with a spoon with other adults in the same room, since such an action undoubtedly would have been painful and caused Amber to make some sort of outcry. However, a cautious officer could have reasonably concluded that the facts available to him at the point of arrest supported at least Amber's contention that Rankin digitally penetrated her. Although further investigation may have been required in order to determine whether the

Additionally, the teachers whom Rankin argues that Evans should have interviewed were employed by Rankin and thus would have been of questionable credibility.[17] A cautious officer certainly could have reasonably concluded that, even if the teachers were to have stated that Rankin had no access to Amber, such testimony would be so undercut by the witnesses' bias in favor of their employer and their own self-interest in asserting that they were always aware of Amber's movements – such supervision being one of their job responsibilities – that it would not defeat the existence of probable cause in light of the other evidence suggesting Rankin's guilt. Finally, interviewing those witnesses prior to picking up Rankin might have alerted him to his possible arrest and, conceivably, precipitated his flight. In light of all of these considerations, a reasonable jury

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spoon incident could be verified, a reasonable officer could conclude that he had sufficient evidence to proceed on the digital penetration allegation and that time was of the essence considering Rankin's position as the owner of a day care center. Furthermore, a prudent officer could reasonably conclude that Amber's statements regarding digital penetration – which she made on several separate occasions and stated in her own words – were more reliable than her single reference to possible penetration by a spoon – which she referred to only in response to a question by Evans.

[17] Rankin also asserts that one of the teachers would have told Evans that she saw Amber rubbing her vagina on November 21. However, we note that a prudent officer who had such information reasonably could have believed that a child would not have rubbed herself so hard as to cause an abrasion. Thus, such information, even had it been credible and had Evans known it, would not have defeated the existence of probable cause.

could not have concluded that a prudent officer could not have reasonably believed that Rankin had sufficient access to Amber to have committed the crime charged.

The Rankins further assert that the physical evidence contradicted Amber's account of events and that those contradictions defeated probable cause. The Rankins argue that Amber's contention that she was abused by Ba Ba Blue on the steps of playground equipment at the school simply could not have been true because Rankin physically could not have performed the actions she described at that location. They contend that a reasonable jury could have concluded that the playground equipment steps were too small for a man of Rankin's size to enter and that the slats on the sides of the equipment were too narrow to permit him to reach into the equipment from the outside. The Rankins also assert that a reasonable jury could have determined that Evans did not examine the playground equipment to determine whether Amber's account of the abuse was consistent with the physical evidence. Assuming this to have been true, the question is whether a prudent officer reasonably could have believed, in light of all the evidence known to him, that Rankin was guilty of sexually abusing Amber.

We conclude that a cautious officer reasonably could have believed that, even if Amber's story was inaccurate as to the precise location of the abuse, the core of her story regarding the abuse and the identity of the abuser was trustworthy and reliable, especially in light of the medical and other evidence corroborating her story. *See Easton v. City of Boulder,* 776 F.2d 1441, 1449-50 (10th Cir.1985), *cert. denied,* 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986).

Furthermore, a prudent person reasonably could have believed that the abuse happened in the approximate area of the playground equipment, if not actually on it. Amber stated on the audiotape that, after Ba Ba Blue made "a hole in [her] bottom," he put her "back on the playground." In the videotaped interview, she said that the abuse took place outside the school. In response to a question from Evans asking whether it was on the playground, she said "yeah." In response to the question of whether it was on a piece of a toy, she said "no." She said that the incident took place on the steps. Interpreting the physical evidence in light of the statements by the victim, it would not be unreasonable for a prudent person to conclude that a three-and-a-half-year-old might either unclearly articulate the location of the abuse or conflate the idea of being put back on the playground after being abused with the idea of where the abuse actually occurred. Additionally, since Amber did not actually state that the abuse occurred on the steps of the playground equipment, there is no reason why a reasonable officer would have to have concluded that Rankin's inability to commit the alleged act on the playground equipment obviated probable cause. Finally, we note that Amber stated that the abuse occurred both inside and outside the schoolhouse, so the fact that Rankin apparently could not have abused Amber on the playground equipment does not affect the possibility that he abused her in the schoolhouse. In light of all of the evidence, we conclude that a reasonable jury could not have concluded that Rankin's alleged lack of access to Amber defeated probable cause.

c. The Victim's Statements

Next, we address the Rankins' contentions that the only information available to Deputy Evans suggesting that Rankin was the perpetrator of any abuse ultimately was based upon statements made by Amber, and that those statements were not sufficiently reliable and trustworthy to support the existence of probable cause. Defendants contend not only that Amber's statements were sufficiently reliable and trustworthy to support probable cause, but also that Evans was prohibited from simply disregarding such statements based upon the age of the victim. We conclude that evidence other than Amber's statements supported the conclusion that Rankin likely was the perpetrator of the charged conduct. We also conclude that Evans was entitled to rely to a meaningful degree on Amber's statements in determining the existence of probable cause, and that those statements supported probable cause.

As noted, Amber's statements did not constitute the only evidence suggesting that Rankin was the person who had abused her. The medical evidence was consistent with two separate episodes of abuse – partial penetration which dated back at least two weeks prior to November 21, and either rubbing or fingering of the genitalia which occurred within 24 hours of Dr. Drummond's examination of Amber. Dr. Brake indicated to Evans that she and the school staff were the only people with access to Amber during the two-week period covering both potential incidents of abuse.

Furthermore, a cautious person reasonably could have believed that Dr. Brake was unlikely either to have

been the abuser or to have been protecting someone else whom she knew to be the abuser since she – at a point at which no one else knew that any abuse might have occurred – told a friend that she thought that Amber had been abused, took her to a pediatrician to have her examined for abuse, and promptly informed the police of the suspected abuse. A prudent person reasonably could have concluded that one who was guilty of, or complicit in, abusive conduct would not spontaneously decide aggressively to volunteer information to people in a position to take prosecutorial action regarding potential abuse and insist that such action be taken.

Thus, having concluded that Dr. Brake was unlikely to have been responsible for the alleged abusive incidents, a cautious person reasonably could have believed that the perpetrator was someone at the school.[18] This conclusion was further supported by Dr. Brake's statement that Amber started exhibiting behavioral changes within a week of beginning her attendance at Sugar Plum. These behavioral changes included unusual clinginess, an abnormal aversion to attending school, and atypical shyness. A seasoned officer reasonably could have concluded that these behavioral changes were consistent with sexual abuse and linked that abuse to the school.[19]

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[18] Although Evans knew that a male coworker of Dr. Brake's had had access to Amber approximately three weeks prior to the medical examination, that person had not had access to her during the two-week period potentially covering the occurrences resulting in both the damage to the hymen and the fresh abrasion.

[19] The Rankins contend that if Evans had interviewed the teachers, they would have told him that Amber exhibited no

Having narrowed the class of likely suspects to the school house, information provided by Dr. Brake suggested that Rankin was the guilty party. Dr. Brake told Evans that, on the day Amber informed her of the abuse, she saw Rankin pick up Amber and that Amber hit him. A prudent officer reasonably could have found this information to be relevant to the probable cause determination in two ways: (1) as Evans testified, an abuser often shows a special interest in a child whom he is abusing, and Rankin's particular attention to Amber in a class of approximately 120 might indicate such a special interest;

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behavioral changes, appeared to be happy at school, and even started to misbehave at the end of the day when she had to leave school. However, a cautious officer reasonably could have concluded that any potential statements by the teachers regarding Amber's behavior would not have been particularly probative considering their limited experience with Amber, particularly in light of the fact that her mother, who clearly knew her very well, indicated that such changes had occurred.

The Rankins also contend that Evans knew that Amber and her family had just moved, that she had been repeatedly moved to new preschools, and that her mother had been paying a lot of attention to Amber's younger brother because of his severe illness. They argue that – knowing about those family circumstances – a cautious officer would not have given significant weight to any behavioral changes. However, we conclude that a cautious officer reasonably could have believed, in light of the knowledge that Amber had frequently moved to new preschools and that her brother's health problems were apparently chronic, that Amber had faced such strains before and that her mother was presumably aware of her child's typical reactions to such ongoing problems. Dr. Brake, however, had nonetheless concluded that Amber's behavior was unusual and reported that conclusion to Evans. A reasonable officer acting cautiously could have given significant weight to her evaluation of her child's behavior.

and (2) the hostility Amber demonstrated towards Rankin by striking him was not typical of her behavior towards adults, as indicated by her mother, suggesting that Rankin had done something to prompt such a reaction.

In addition to this independent evidence linking Rankin to the abuse, Evans relied on Amber's statements to both her mother and the police in determining that probable cause existed to arrest Rankin. As noted above, the essential question regarding Amber's statements is whether they were sufficiently reliable and trustworthy to support a determination of probable cause. We conclude as a matter of law that a prudent person reasonably could have believed that the fundamental information provided by Amber's statements was sufficiently reliable and trustworthy to consider in determining the existence of probable cause.

Generally, an officer is entitled to rely on a victim's criminal complaint as support for probable cause. *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1676, 134 L.Ed.2d 779 (1996). The Rankins assert that Evans was not entitled to so rely here because the victim's age and inconsistencies rendered her statements unreliable. We conclude that, although a child victim's statements must be evaluated in light of her age, Amber's statements – considered along with the other supporting evidence – were sufficiently reliable and trustworthy at their core to form the basis for probable cause to arrest Rankin. *See Marx*, 905 F.2d at 1506 (indicating that, although a four-year-old's age affected the weight due her statements, the arresting officer could not simply disregard her statements in determining whether probable cause existed);

Myers v. Morris, 810 F.2d 1437, 1456-57 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); *Easton*, 776 F.2d at 1450-51.

Next, we address the Rankins' contention that Amber never explicitly stated that Rankin or Mr. Doug abused her. Instead, they note that she merely referred to her abuser as Ba Ba Blue. However, they do not dispute that Evans knew at the time of Rankin's arrest that Rankin was referred to by the children as Baba Loo. They also do not contest that Amber in particular called Rankin Ba Ba Blue, which was her pronunciation of Baba Loo. Amber identified Ba Ba Blue as the culprit in both her first statement regarding the abuse made to her mother and the subsequent audiotaped statement. Dr. Brake told Evans that Amber also had identified her alleged abuser as Ba Ba Blue to Dr. Drummond. Furthermore, in the videotaped interview of Amber, she ultimately responded "Ba Ba Blue" to questions regarding the identity of her abuser.[20] In addition, Amber consistently referred to her

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[20] The Rankins assert that the videotaped statement in which Amber identified "Ba Ba Blue" as her abuser demonstrates the unreliability of her statements because she initially answered "Donald Duck" and "Pluto" in response to the question of who did the things to her which she described. The Rankins assert that her identification of two cartoon characters, followed immediately by her identification of Ba Ba Blue as her abuser, precluded Evans from relying on her statements for probable cause to arrest Rankin. However, a prudent officer reasonably could conclude that Amber was merely playing when she answered "Donald Duck" and "Pluto," but was being serious when she ultimately responded Ba Ba Blue because: (1) she had repeatedly identified Ba Ba Blue as the abuser in past statements and had never before

abuser as "he," indicating that the offending individual was a male. As noted above, the only people beside Amber's mother who appeared to have access to her were the staff at Sugar Plum. In addition, Amber indicated that all of her teachers were female, suggesting that Rankin was the only male at Sugar Plum (a fact which Rankin subsequently conceded during questioning). Accordingly, we conclude that Amber's statements provided sufficient information for a cautious person reasonably to believe that Amber was abused by someone called Ba Ba Blue, and that other evidence indicated that Ba Ba Blue was Rankin.

The Rankins also assert that inconsistencies in Amber's videotaped statement indicated that her statements as a whole were unreliable. For instance, they note that when Amber was questioned regarding the timing of any abusive incidents, she stated that she had been abused "today" – the date of the interview – but not on the day before, the date on which she reported the incidents to her mother and on which Dr. Brake told Evans

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mentioned the first two characters; (2) she actually knew someone who was referred to as Ba Ba Blue, unlike the other characters; (3) she repeatedly referred to the person who abused her as "he" and the person referred to as Ba Ba Blue was a male; and (4) other corroborating evidence was consistent with abuse by the individual identified as Ba Ba Blue. Thus, a cautious officer reasonably could have concluded that Amber, when referring to Ba Ba Blue, was referring to a real person as opposed to a cartoon character. In light of the other evidence, such an officer also reasonably could have concluded that Rankin was Ba Ba Blue.

that Amber had indicated the abuse had occurred.[21] However, an officer as seasoned in the field of child abuse as Deputy Evans reasonably could have discounted Amber's statements regarding the timing of the abuse because of the fact that young children do not have a particularly strong grasp of the concept of time, although they are able to articulate more concrete concepts such as events that have occurred or things that have happened to them.[22]

The Rankins also point to several other comments by Amber which they assert fatally undermine the reliability of her statements.[23] Although we acknowledge that a stronger statement by the victim would be preferable prior to arrest, we cannot conclude that a prudent officer could not have reasonably relied on the fundamental allegation consistently made by Amber: that a male

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[21] The Rankins also note the varying times which Amber gave Dr. Drummond for the dates of the abuse as evidence that Evans should not have relied on Amber's statements. The Rankins, however, have pointed to no evidence indicating that Dr. Drummond relayed that information to Evans.

[22] For example, Dr. Drummond testified that, in his experience, children who were unable to fully grasp temporal concepts were able accurately to describe more concrete events such as physical pain. A police officer such as Evans, with formal training and extensive practical experience in child abuse cases, would be aware of children's difficulties with time, and reasonably could have discounted those inconsistencies.

[23] For instance, they note that Amber stated in the videotaped interview that Dr. Drummond stuck a thermometer in her bottom and that the testimony at trial showed that he did not do so. However, the Rankins point to no evidence indicating that Evans knew or should have known of this inconsistency at the time of the arrest.

named Ba Ba Blue made a hole in her bottom at school.[24] She made statements to this effect on at least four separate occasions of which Evans was aware: to her mother, to Dr. Drummond, on audiotape, and to him during the videotaped interview.[25] In light of the medical evidence supporting the conclusion that abuse had occurred, Dr. Brake's observations regarding Amber's behavioral changes, and her statements regarding the limited number of people who had access to Amber during the relevant time period, we conclude that Evans properly relied on Amber's statements in establishing the

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[24] The Rankins contend that Amber's assertion that the abuser had stuck a finger in her bottom undercut the reliability of her statement regarding the abuse because it was inconsistent with the medical evidence which showed vaginal penetration, but no anal contact. However, we note that, in the videotaped interview, Amber referred to her genitals as her bottom. We also note that it is not surprising that a three-year-old would not have separate words for her vagina and bottom. Accordingly, a reasonable officer could conclude that Amber intended to refer to her vagina.

[25] Defendants assert that Amber also made such statements to Officer Honholz and Dr. Decharme. Plaintiffs assert that a reasonable jury could have concluded that such statements were never made to these individuals. We conclude that a prudent officer reasonably could have relied upon Dr. Brake's assertion that Amber had made such a statement to Dr. Decharme and on Officer's Honholz's representation to Evans and Dr. Brake that Amber had made such a statement to him in evaluating the existence of probable cause. However, even disregarding these additional statements, probable cause existed as a matter of law.

existence of probable cause to arrest Rankin.[26] *See Marx*, 905 F.2d at 1506; *Myers*, 810 F.2d at 1456-57.

Conclusion

In sum, we conclude that the trial court was not procedurally barred by Federal Rule of Civil Procedure 50 from granting a JNOV in favor of defendants on the ground that probable cause existed. Although we note with regret the undoubted hardship caused to plaintiffs by Doug Rankin's arrest and detention, especially in light of his subsequent complete exoneration by the grand jury, we conclude that the district court correctly determined that probable cause existed as a matter of law. Accordingly, we affirm the district court's grant of a JNOV in favor of defendants and dismiss the cross-appeal as moot.

AFFIRMED.

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[26] We note that under Fla. Stat. 794.022(1) (West Supp.1990), "[t]he testimony of the victim need not be corroborated in a prosecution under s. 794.011 [commission of a sexual battery of a child under twelve]." However, we do not need to address the question of how this statutory section would apply when the victim is a young child and the statement is merely being used to establish probable cause, rather than as the sole basis for a conviction, because Evans had evidence in addition to Amber's statements which incriminated Rankin at the time of arrest.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DOUG RANKIN and VICTORIA RANKIN,

Plaintiffs,

CASE NO. 91-8012-CIV-GONZALEZ

v.

MARK EVANS and PALM BEACH COUNTY SHERIFF'S DEPARTMENT,

Defendants.

ORDER

(Filed May 15, 1995)

THIS CAUSE has come before the Court upon Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, filed on January 4, 1995. The motions have been fully briefed and are ripe for disposition.

Following a trial of this matter, the Jury returned its verdict in favor of Plaintiffs on both Counts of the Complaint. First, the Jury found that Defendants violated Plaintiffs' Fourth and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. Second, the Jury found Defendants' liable for false arrest/false imprisonment under Florida law.

When considering a motion for judgment notwithstanding the verdict, the Court must view all evidence

and inferences in the light most favorable to the non-moving party. *Carter v. City of Miami,* 870 F.2d 578 581 (11th Cir. 1989). Only if the Court concludes that no reasonable jury could have found in favor of the prevailing party should the Court disturb a jury's verdict. "A mere scintilla of evidence is insufficient to present a question for the jury. The substantial evidence standard requires evidence of such quality and weight that reasonable and fair-minded jurors might reach different conclusions." *Cannon v. Macon County,* 1 F.3d 1558, 1562 (11th Cir. 1993), citing *Von Stein v. Brescher,* 904 F.2d 572, 578 (11th Cir. 1990). Because the Court concludes that there was no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiffs in this case on either count of the Complaint, this Court shall enter judgment as a matter of law and conditionally deny the motion for new trial. Fed.R.Civ.P. 50(b)-(c).

Under both federal and Florida law, the existence of probable cause is a complete defense to the claims asserted by Plaintiffs in their Complaint. *See* Chester J. Antieau, 1 *Federal Civil Rights Acts; Civil Practice* § 126; *Marx v. Gumbinner,* 905 F.2d 1503 (11th Cir. 1990); *Von Stein v. Brescher,* 904 F.2d 572 (11th Cir. 1990); *Lindsey v. Storey,* 936 F.2d 554 (11th Cir. 1991); Fla.Stat. § 901.15(3); *LeGrand v. Dean,* 564 So.2d 510, 511 (Fla.Dist.Ct.App. 1990). Probable cause exists where a reasonably cautious person, knowing all of the facts known by an arresting officer at the time of an arrest, would have believed that the accused was guilty of the offense charged. *LeGrand,* at 513; 24 Fla.Jur.2d False Imprisonment § 21; *Brinegar v. United States,* 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed. 1879 (1949); *Wilson v. Attaway,* 757 F.2d 1227,

1235 (11th Cir. 1985). An arresting officer need not rely upon overwhelmingly convincing evidence, but only "reasonably trustworthy information," *Von Stein, supra,* citing *Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). Probable cause "must be judged not with clinical detachment but with a common sense view to the realities of normal life." *Wilson,* 757 F.2d at 1235.

Viewing all of the facts in the light most favorable to Plaintiffs, the Court concludes that probable cause existed in the present case. Accordingly, Defendants were entitled to a judgment as a matter of law before this case was submitted to the Jury. Out of an abundance of caution, and pursuant to Fed.R.Civ.P. 50(b), this Court reserved ruling on Defendants' motion and submitted the case to the Jury. However, the Jury having returned a verdict contrary to any reasonable interpretation of the law and facts in this case, this Court shall enter judgment notwithstanding the verdict.

Accordingly, having considered the motions and the record, and being otherwise duly advised, it is hereby:

ORDERED and **ADJUDGED** as follows:

1. Defendants' Motion for Judgment Notwithstanding the Verdict is **GRANTED** and Judgment as a Matter of Law is hereby entered in favor of Defendants and against Plaintiffs on both counts of the Complaint.

2. Pursuant to Fed.R.Civ.P. 50(e), Defendants' Motion for New Trial is conditionally **DENIED.** This conditional denial is based upon the fact that this Court's present ruling is rooted in its determination that probable cause existed in this case. As no other error requiring a

new trial exists in the record, should the court of appeals disagree with this Court's determination, there would exist no grounds for a new trial.

3. All other pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 15th day of May, 1995.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES
DISTRICT JUDGE

cc: Counsel

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-4744

DOUG RANKIN,
VICTORIA RANKIN,

Plaintiffs-Appellants,
Cross-Appellees,

versus

MARK EVANS,
RICHARD WILLIE, Sheriff of
Palm Beach County, et al.

Defendants-Appellees,
Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed April 2, 1998)

BEFORE: BARKETT, Circuit Judge, KRAVITCH, Senior Circuit Judge, and HARRIS*, Senior District.

PER CURIAM:

The petition(s) for rehearing filed by the appellants' is DENIED.

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* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

FILED
AUG 13 1998
OFFICE OF THE CLERK

No. 97-2012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOUG RANKIN and VICTORIA RANKIN,
Petitioners,
v.
MARK EVANS, RICHARD WILLE,
SHERIFF OF PALM BEACH COUNTY,
PALM BEACH COUNTY SHERIFF'S DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether technical noncompliance with Fed. R. Civ. Pro. 50(a)(2) may be excused in situations where the purpose of the Rule is satisfied and the trial judge and opposing counsel have actual notice of the basis for the motion for judgment as a matter of law.

II. Whether petitioners' Seventh Amendment rights were violated where they had no viable causes of action triable by a jury and the trial judge should have entered summary final judgment against them prior to trial because there was probable cause for the arrest.

LIST OF PARTIES

The following listed persons are parties to this case:

Mark Evans
Doug Rankin
Victoria Rankin
Richard Wille * as Sheriff of Palm Beach County

---

* Sheriff Wille's name is misspelled in the caption of the Eleventh Circuit's opinion and is misspelled in the petition for a writ of certiorari. His name was spelled correctly throughout the record before the trial court.

The petitioners list the Palm Beach County Sheriff's Department as a party to this case. It is **not**. Richard Wille, as Sheriff of Palm Beach County, was substituted as the defendant in Count II.

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IN THE

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OCTOBER TERM, 1997

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DOUG RANKIN and VICTORIA RANKIN,
Petitioners,

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MARK EVANS, RICHARD WILLE,
SHERIFF OF PALM BEACH COUNTY,
PALM BEACH COUNTY SHERIFF'S DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The petitioners' statement regarding the opinions below is basically correct. In addition, the following should be noted. The case was tried before the Honorable Jose A. Gonzalez in the Southern District of Florida. The Honorable Stanley S. Harris, Senior Judge for the District of Columbia, sitting by designation, wrote the opinion of the United States Court of Appeals for the Eleventh Circuit. The Honorable Rosemary Barkett, Circuit Judge, and the Honorable Phyllis Kravitch, Senior Circuit Judge, concurred in the unanimous decision below.

STATEMENT OF JURISDICTION

The petitioners' statement of jurisdiction is basically correct. It should be noted that the opinion and judgment

of the United States Court of Appeals for the Eleventh Circuit were entered on January 29, 1998, and the petitioners filed their motion for rehearing in the United States Court of Appeals for the Eleventh Circuit on February 19, 1998.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit that affirmed an order of the trial judge that granted the motion of defendants, Mark Evans and Richard Wille, as sheriff of Palm Beach County, for a judgment notwithstanding the verdict and entered judgment as a matter of law in favor of the defendants and against the plaintiffs, Doug Rankin and Victoria Rankin.

This lawsuit arose out of the November 22, 1988, arrest of Doug Rankin by the Palm Beach County Sheriff's Office for sexual abuse of a child under the age of twelve. The child he allegedly abused, Amber Brake, was three years old at the time of the incident. The facts concerning the assault, the sheriff's investigation and subsequent arrest of Doug Rankin for the assault, are set forth at length in the opinion of the Eleventh Circuit.

The respondents incorporate by reference and rely on the facts in the opinion below. For clarity, the respondents have set forth only a short factual synopsis in this brief. In addition, the respondents in this brief in opposition have set forth a number of glaring omissions and inaccurate statements made by the petitioners regarding the record.

The record below reflects that Amber was sexually abused and that the young toddler told her mother, a clinical psychologist, that her "bottom was broken, that Ba Ba Blue had used his finger and made a hole in it, it was broken." (R.8-463) The child's pediatrician, Dr. Drummond, examined her on the night that the child's mother learned of the assault. Dr. Drummond questioned

Amber and asked her if anyone did anything to her, to which the child responded "yes." (R.6-77) He asked "who?" and Amber replied "Ba Ba Blue". (R.6-77) He asked "how?" and Amber replied "he pinched my bottom" and "he used his finger to make a hole." (R.6-77) When Dr. Drummond asked her "when?" Amber responded with a shrug. In response to questions of "today?" and "yesterday?" the child answered "yes." (R.6-77; plaintiffs' exhibit 12) Dr. Drummond performed a physical examination of Amber's genital area and found an area of abrasion and a notch in the child's hymen that was consistent with child sexual abuse. (R.6-78) The notch was actually a physical tear. (R.6-91)

After Dr. Drummond finished his examination of Amber, he got very quiet and seemed disturbed. (R.8-470) According to Dr. Brake, the child's mother, the pediatrician told her that there were lacerations and abrasions of Amber's genital area that were consistent with digital penetration. (R.8-470) Dr. Drummond told the mother "Let's get this guy off the street" and informed her that he would call HRS the following morning. Dr. Brake responded that she would call the Sheriff's office. (R.8-471) Dr. Drummond testified at trial that if the mother had not contacted the authorities, he would have, because it was his obligation to do so. (R.6-93)

On the following morning, November 22, 1988, Dr. Brake called the Palm Beach County Sheriff's Department at 9:06 a.m. and left a message "has proof her three year old has been molested." (plaintiffs' exhibit 1) The case was assigned to Deputy Mark Evans for investigation. His first involvement with this matter was when he was given the telephone message slip and asked to call Dr. Brake. (R.6-36) He contacted her, scheduled an interview with her and the child and arranged to have an HRS representative present at the interview. (R.6-37) According to Deputy Evans, the first thing done in a case of child sexual abuse is an interview of the child. (R.6-37)

On November 22, Dr. Brake met with Deputy Evans, gave him a tape of her daughter's recitation of what had occurred, and told Deputy Evans exactly what transpired at Dr. Drummond's office on the preceding night. (R.8-470) Dr. Brake informed Deputy Evans that her daughter, Amber, had identified Doug Rankin to her as "Ba Ba Blue" on several occasions. (R.8-472) A teacher at the school informed Dr. Brake that the children called Doug Rankin "Ba Ba Blue". Dr. Brake advised Deputy Evans that Amber did not call anyone else "Ba Ba Blue" and that Amber never identified another human being by that name. (R.8-472)

Dr. Brake made it clear to Deputy Evans that she wanted to prosecute Doug Rankin and that she was willing to testify against him under oath. There was absolutely no doubt in her mind at that point as to who had abused her child. (R.8-483) Dr. Brake considered her child to be a victim of crime. She believed that her child had been sexually molested and that Amber had been the victim of digital vaginal penetration by Doug Rankin. (R.8-484) She was convinced that she relayed everything she knew about this incident to Deputy Evans and the authorities. She asked Deputy Evans what steps would be necessary in order to have Rankin charged and prosecuted.

On the morning of November 23, Deputy Evans went to the Sugar Plum School to arrest Doug Rankin. The determination Deputy Evans had to make as a police officer before he could arrest Rankin was that there was probable cause for the arrest. (R.7-157) Based on all of the information that he had in November 1988—a recorded self-initiated statement from a child, medical evidence from a physician, the mother's statement that there had been a change in the child's behavior since enrollment in the school, a statement from another clinical psychologist who noted the change, and no convincing evidence that Rankin could not have had access to the child—Deputy Evans determined there was probable cause

to arrest Rankin. (R.7-157) Based on this evidence, Deputy Evans arrested him.

The grand jury did not return an indictment against Doug Rankin. Subsequently, Doug Rankin and his wife, Victoria Rankin, instituted this action asserting a federal claim pursuant to 42 U.S.C. § 1983 for violation of Doug Rankin's constitutional rights and a state claim for false arrest. The action was filed in the Southern District of Florida against Deputy Sheriff Mark Evans, Richard P. Wille, as Sheriff of Palm Beach County, and Palm Beach County Sheriff's Department. (R.1-1-1 through 5)

The defendants answered the complaint, denied the material allegations and asserted various affirmative defenses, including a defense that probable cause existed for the arrest of Doug Rankin. (R.1-13-1 through 4) The defendants moved for summary judgment. (R.1-58-1 *et seq.*) One basis for the motion for summary judgment on both the civil rights claim and the state claim for false arrest was that Deputy Evans had probable cause to arrest Doug Rankin.

In response to the defendants' motion for summary judgment, the plaintiffs asserted "The primary issue in this case is whether the warrantless arrest of Doug Rankin was proper." The plaintiffs argued that the arrest was without probable cause. (R.3-87-21; 24) Following issue of the magistrate's report and recommendations regarding disposition of defendants' motion for summary judgment, the plaintiffs filed a response, stating: "The magistrate is correct that under the circumstances of this case, probable cause cannot be found as a matter of law. *This is the dispositive issue under both Court* [sic] *I and Count II of the Complaint.*" [emphasis supplied] (R.4-122-4) The trial court denied the motion for summary judgment on the main claim, but granted the motion insofar as it asserted a claim against the Sheriff's Department in Count I. (R.4-138-1 *et seq.*)

The plaintiffs have not been forthcoming about the state of the record below and have failed to inform this court of many facts relevant to disposition of this petition for a writ of certiorari. These omissions by the plaintiffs are tantamount to misstatements of fact. For instance, the plaintiffs fail to advise this court that all parties and the trial judge knew before this trial even began that the existence of probable cause was the central issue in this case. In the pretrial stipulation the parties stated:

> 7. Statement of issues to be litigated.
>
> (a) Whether Mark Evans had probable cause to arrest Doug Rankin for sexual battery. (Plaintiff has the burden of showing no probable cause on the civil rights claim and the defendant Palm Beach County Sheriff's Department has the burden of establishing probable cause on the false arrest claim.) Defendants contend that they are entitled to summary judgment as a matter of law on this issue. (R.3-99-4)

In the pretrial stipulation the parties also specified:

> 9. Issues of law.
>
> (a) Whether Mark Evans had probable cause to arrest Doug Rankin for sexual battery. Plaintiffs contend that this is an issue of fact under the circumstances of this case. *Defendants contend they are entitled to judgment as a matter of law on this issue.* [emphasis supplied] (R.3-99-5)

The case was tried by a jury in Fort Lauderdale, Florida before the Honorable Jose A. Gonzalez, Jr. commencing December 15, 1994. At trial the defendants moved for a directed verdict. (R.88-460 through 462; 8-502) The day before defendants moved for a directed verdict (and four days after trial had begun), defense counsel supplied plaintiffs' counsel and the trial judge with a trial memorandum that specifically briefed the issue of probable cause for the arrest. (R.5-177-5 *et seq.*) The grounds for the defendants' motion for directed

verdict or judgment as a matter of law, which were set forth in the defendants' trial brief, were that Deputy Evans had probable cause to arrest Doug Rankin and that mere negligence is not actionable on a claim brought pursuant to 42 U.S.C. § 1983. The trial judge did not allow argument by any party on the motion for directed verdict and summarily denied the motion. The entire colloquy pertaining to the motion is as follows:

> The Court: Let me see the presentment. Okay. Are there any motions to be made at the conclusion of the Plaintiffs' case?
>
> Mr. Barry: Yes, Your Honor. The Defendants, Mark Evans and Richard P. Wille will move for a directed verdict.
>
> The Court: All right. The Court has considered the evidence and the testimony offered, and has specifically considered the Defendant's trial memorandum and all the cases cited in support of that memorandum.
>
> And specifically has considered the case of Carol LeGrande versus Charles S. Dean (phonetic), which is found at 564 S. 2d 510, and the motion for a directed verdict will be denied. (R.8-460)

The defendants, relying extensively on *LeGrand v. Dean*, 564 So. 2d 510 (Fla. 5th DCA 1990), *rev. den* 576 So. 2d 288, had argued in their trial brief that Evans had probable cause to arrest Rankin and that what circumstances constitute probable cause is a legal question. (R.5-177-1 *et seq.*) Judge Gonzalez was very familiar with the *LeGrand* case and the fact that it presented the same legal issues as this case.

LeGrand v. Dean involved facts substantially similar to those in this case. In that *en banc* decision, the court affirmed a summary judgment entered in favor of the sheriff, holding that the deputy sheriff had probable cause to arrest the plaintiffs for sexual battery of a child under the age of twelve. That case involved a sexual battery on an eleven and a half year old female victim that

occurred when she spent the night at the plaintiffs' house with their daughter. While the child was sleeping, the LeGrands allegedly took turns digitally penetrating her. The child did not say anything about the incident for several weeks, at which point she told a friend about the incident. With her friend's encouragement, the victim and her parents reported the alleged assault to the Sheriff's Department six weeks after it occurred.

A sheriff's deputy contacted the University of Florida child protection team and arranged for a videotaped interview of the victim. The deputy sheriff viewed the entire interview as the child described the sexual assault and interviewed the victim's parents. Thereafter, the deputy sheriff arrested the LeGrands for sexual battery upon a child under the age of twelve. No medical examination was performed. The deputy sheriff did not question the other children present in the same room and in the same bed at the time of the assault, nor did he question the LeGrands. The deputy sheriff did not question the friend to whom the disclosure was made. The deputy sheriff relied on the opinion of the child protection expert that the child was telling the truth. Based on these facts, the trial court entered a summary judgment for defendants. The appellate court affirmed, finding there was probable cause for the arrest. The majority reasoned that since the child's testimony alone would have been sufficient to support a conviction, if believed by the jury, *ipso facto,* it must equal probable cause.

Relying on the *LeGrand* case, the trial judge denied Deputy Evans' and Sheriff Wille's motion for directed verdict. At the conclusion of all the evidence, the defendants renewed their motion for directed verdict. (R. 8-502) Again the trial judge allowed no argument by counsel and denied the motion. (R.8-502) The entire colloquy pertaining to the motion is as follows:

> The Court: All right. Motions at the close of all the evidence on behalf of any party.

> Mr. Barry: Defendant Mark Evans and Richard B. [sic] Wille would renew its motion for a directed verdict.
>
> The Court: All right. The Defendants' renewed motion for a directed verdict, made at the close of all the evidence, will be denied on the basis previously announced at the close of the Plaintiffs' case in chief.
>
> Okay. We're going to go to the charge conference. (R. 8-502)

The court submitted the false arrest and violation of civil rights claims to the jury. The jury returned a special interrogatory verdict finding for the plaintiffs on the civil rights and false arrest claims. The jury awarded Doug Rankin one million dollars as damages for intangible damages, damage to personal reputation, and loss of past income and earning capacity resulting from the arrest. (R.5-174-1 through 3) The jury awarded Victoria Rankin $500,000 as damages for loss of consortium arising from Rankin's arrest. The jury awarded the plaintiffs $500,000 as business damages.

The trial court entered final judgments in favor of the plaintiffs, and against the defendants. (R. 5-180-1; 5-181-1; 5-182-1) The defendants on January 4, 1995, filed a timely renewed motion for judgment notwithstanding the verdict, a timely motion for remittitur, a timely motion to alter or amend the judgment and an alternate motion for a new trial. (R.5-185-1 *et seq.*; 5-186-1 *et seq.*; 5-188-1 *et seq.*) Defendants did not file supporting memoranda. Defense counsel wished to review the transcript before filing those memoranda. Consequently, defendants filed a motion to enlarge the time to file addenda to the post-trial motions and to file supporting memoranda. (R.5-187-1 *et seq.*)

The trial court granted the request for an extension of time for the defendants to make additions to their post-trial motions and to file their memoranda. (R.5-190-1)

The court later vacated the order granting an extension to make additions to defendants' post-trial motions and memoranda. (R.5-196-1) However, after defendants filed their post-trial motions and "reply" memoranda to the plaintiffs' memoranda, the trial court clarified its ruling on the motion to enlarge time and specified that it intended to grant an extension of time for the defendants to file addenda to their original post-trial motions. (R.5-202-1) The court treated the defendants' "replies" as addenda and memoranda in support of the defendants' original post-trial motions. (R.5-200-1; 5-201-1) The defendants' reply on their motion for judgment notwithstanding the verdict, as well as their post-trial motion for judgment notwithstanding the verdict, clearly raised probable cause for the arrest as grounds for the motion. (R. 5-201-1 *et seq.*)

The court conditionally denied the defendants' motion for new trial, and denied as moot defendants' motion for remittitur, motion for judgment notwithstanding the verdict on the loss of consortium claims, and motion to alter or amend the judgment. The court entered judgment as a matter of law in favor of the defendants on the civil rights and false arrest claims. (R. 5-207-1 *et seq.*)

The plaintiffs filed a notice of appeal seeking review of the order granting the motion for judgment notwithstanding the verdict. (R. 5-208-1 *et seq.*) The defendants filed a notice of cross-appeal seeking review of the portions of the appealed order that conditionally denied their motion for new trial and denied their other post-trial motions as moot. (R.5-209-1 *et seq.*) The Eleventh Circuit, in a unanimous decision authored by Judge Harris, affirmed the decision of Judge Gonzalez. The appellate court held that the grant of a judgment notwithstanding the verdict for defendants was not procedurally barred. The appellate court held that where all parties and the

trial judge are aware of the specific grounds for the motion, strict enforcement of the specificity requirement of Fed. R. Civ. Pro. 50(a)(2) is unnecessary to serve the purpose of the rule.

SUMMARY OF THE ARGUMENT

This Court should deny the petition for a writ of certiorari. This is a fact bound case. The decision below turns on the specific facts of this case. Moreover, there is no confusion or conflict in decisions among the federal circuit courts about the specifics required to satisfy Fed. R. Civ. P. 50. In short, there is no reason for this court to exercise its discretionary jurisdiction.

The defendants were entitled to judgment as a matter of law on the claims for violation of Doug Rankin's civil rights and for false arrest. Defendants' motion was timely and adequate to apprise the trial judge and plaintiffs' counsel of the basis for the motion. The trial judge and plaintiffs' counsel knew exactly what the grounds were for defendants' motion. Furthermore, the plaintiffs waived any technical objection they had to the oral motions and post-trial motion because they failed to object at trial to any deficiency in the motion. The evidence, which is set forth in the opinion of the United States Court of Appeals for the Eleventh Circuit, shows that Deputy Evans had probable cause to arrest Doug Rankin.

REASONS WHY THE PETITION SHOULD BE DENIED

I. WHETHER TECHNICAL NONCOMPLIANCE WITH FED. R. CIV. PRO. 50(a)(2) MAY BE EXCUSED IN SITUATIONS WHERE THE PURPOSE OF THE RULE IS SATISFIED AND THE TRIAL JUDGE AND OPPOSING COUNSEL HAVE ACTUAL NOTICE OF THE BASIS FOR THE MOTION FOR JUDGMENT AS A MATTER OF LAW.

Both the plaintiffs and the trial judge knew before this trial ever began that the existence of probable cause was

the central issue in this case. The parties repeatedly stated this in the motion for summary judgment and response thereto, in plaintiffs' response to the magistrate's recommendations on the motion for summary judgment, and in the pretrial stipulation. Now, the plaintiffs disingenuously suggest that because the defendants did not orally articulate the exact basis of their motion during the trial, the trial judge could not grant a motion for judgment as a matter of law. The United States Court of Appeals for the Eleventh Circuit rejected this technical argument, as should this Court. The decision of the Eleventh Circuit is not in conflict with other appellate decisions, nor is there any confusion among the federal circuit courts regarding the specificity required for a motion under Fed. R. Civ. Pro. 50(a)(2). The case law amply supports the appellate court's decision.

The most significant reason why this Court should decline certiorari is because this is a fact bound case. The decision below turns upon its own facts and will affect few other than these litigants.

The day before defendants moved for a directed verdict they supplied plaintiffs' counsel and the trial judge with a trial memorandum that specifically briefed what all parties recognized as the central issue in this case—probable cause for the arrest. (R.5-177-5 *et seq.*) Before defendants could even make an argument on their motion made at the conclusion of the plaintiffs' case, the trial judge cut off argument and summarily ruled, stating that he had specifically considered the defendants' trial memorandum and all of the cases cited therein and that the court had specifically considered the decision in *LeGrand v. Dean, supra,* which is discussed at pages 7-8 of this brief. When the defendants renewed their motion at the conclusion of all the evidence, once again the court did not permit argument by any of the parties and denied the motion "on the basis previously announced at the close of the Plaintiffs' case in chief." (R.8-502)

The plaintiffs never raised any objection, either during the trial or in their post-trial memoranda, that the defendants' motion was technically deficient because it failed to set forth the grounds for the motion. (R.8-460; 502; R.5-195-1; R.5-203-1) The plaintiffs' failure to object at trial to the technical deficiency in defendants' motion precludes them from complaining on appeal about the lack of specificity of the motion. In *Cox v. City of Freeman, Missouri,* 321 F.2d 887 (8th Cir. 1963), the court specifically rejected plaintiffs' contention that the defendants had failed to state the specific grounds of their motion for a directed verdict as required by Fed. R. Civ. Pro. 50(a). The court noted that it would be an unfair and dilatory practice to allow a plaintiff to raise this issue at the appellate level after remaining silent when the trial judge makes his decision. Likewise, in *Quint v. Kallaos,* 161 F.2d 605 (8th Cir. 1947), the court rejected the same argument.

In this case the plaintiffs raised a technical issue for the first time on appeal. *See Halsell v. Kimberly-Clark Corp.,* 683 F.2d 285 (8th Cir. 1982). It is very clear from the transcript and the pleadings filed in this case that the trial judge and plaintiffs' counsel fully understood that the basis of the motion was that Deputy Evans had probable cause to arrest Doug Rankin. Where, as in this case, the trial judge and opposing counsel fully understand the grounds for a motion for directed verdict, the courts have held that a technically deficient motion is sufficient to form the basis of a post-trial motion for judgment as a matter of law. The court did precisely that in *Lewis v. Nelson,* 277 F.2d 207 (8th Cir. 1960).

In this case the Eleventh Circuit held that the defendants' motion made during trial was sufficient to form the basis of a post-trial motion for judgment as a matter of law. Its decision is in accord with decisions of other federal circuit courts. So long as the trial judge and opposing counsel understand the basis for the motion and

the trial judge is adequately informed of the relevant law, a technical deficiency in the oral motion made at trial should not preclude the trial judge from entering judgment for defendants as a matter of law. *See Clarke v. O'Connor*, 435 F.2d 104 (D.C. Cir. 1970); *Railway Express Agency, Inc. v. Epperson*, 240 F.2d 189 (8th Cir. 1957); *Stewart v. Thigpen*, 730 F.2d 1002 (5th Cir. 1984). This is particularly pertinent in a case like this where the court rules before either side makes an argument. In that respect this case is factually distinguishable from the cases cited by plaintiffs on this issue.

Finally, the defendants clearly raised the probable cause issue in their post-trial motions. The issue was timely asserted in the "reply" that the trial judge treated as addenda to the post-trial motions and memoranda. (R.5-201-1 *et seq.*; R. 5-202-1) The plaintiffs filed a response to that "reply" and never asserted waiver of this issue or technical inadequacy of the defendants' oral motions made during trial. (R.5-203-1 *et seq.*) In *Narey v. Dean*, 32 F.3d 1521 (11th Cir. 1994), the court held that raising a specific issue for the first time in a post-trial motion for a directed verdict does not always preclude raising an issue on appeal. The court noted five exceptions. The second exception discussed in *Narey* is particularly pertinent in this case. That exception is that an appellate court can consider an objection or issue that was not raised at the trial level where the appellant had no opportunity to raise the issue at the trial level. A corollary of that principle should be that a trial judge is not precluded from entering judgment as a matter of law in those same circumstances. In this case, the transcript shows that the defendants had no opportunity to make their argument to the judge during trial. The judge summarily ruled before either side argued. Thus, under the second exception noted in *Narey*, the defendants should have been permitted to raise the issue post-trial.

Moreover, if the evidence is insufficient as a matter of law, but no motion is made under Fed. R. Civ. Pro.

50(a), the trial court can set aside the verdict and order a new trial. 9A Wright and Miller, *Federal Practice and Procedure*, § 2537. In this case even if the defendants' motion for directed verdict was insufficient, the defendants' motion for new trial on the grounds that the verdict was against the manifest weight of the evidence warranted a new trial. As shown below in point II, this case should never have gone to trial. The court should have granted the defendants' motion for summary judgment because there was probable cause for the arrest.

II. WHETHER PETITIONERS' SEVENTH AMENDMENT RIGHTS WERE VIOLATED WHERE THEY HAD NO VIABLE CAUSES OF ACTION TRIABLE BY A JURY AND THE TRIAL JUDGE SHOULD HAVE ENTERED SUMMARY FINAL JUDGMENT AGAINST THEM PRIOR TO TRIAL BECAUSE THERE WAS PROBABLE CAUSE FOR THE ARREST.

The petitioners never raised this argument at the trial level or before the United States Court of Appeals for the Eleventh Circuit. That precludes them from raising this issue for the first time before this Court.

As shown in point I above and in the decision of the Eleventh Circuit, the trial judge and plaintiffs' counsel had actual notice of the grounds for the motion. Thus there could be no Seventh Amendment violation.

This case should never have been tried. Instead, the trial judge should have granted the defendants' motion for summary judgment. The motion for summary judgment very clearly sought judgment in defendants' favor on the grounds that there was probable cause for the arrest. It simply defies logic to say it is a violation of the Seventh Amendment to enter a judgment contrary to that of the jury where the case should never have been submitted to the jury, but should have been decided as a matter of law prior to trial.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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